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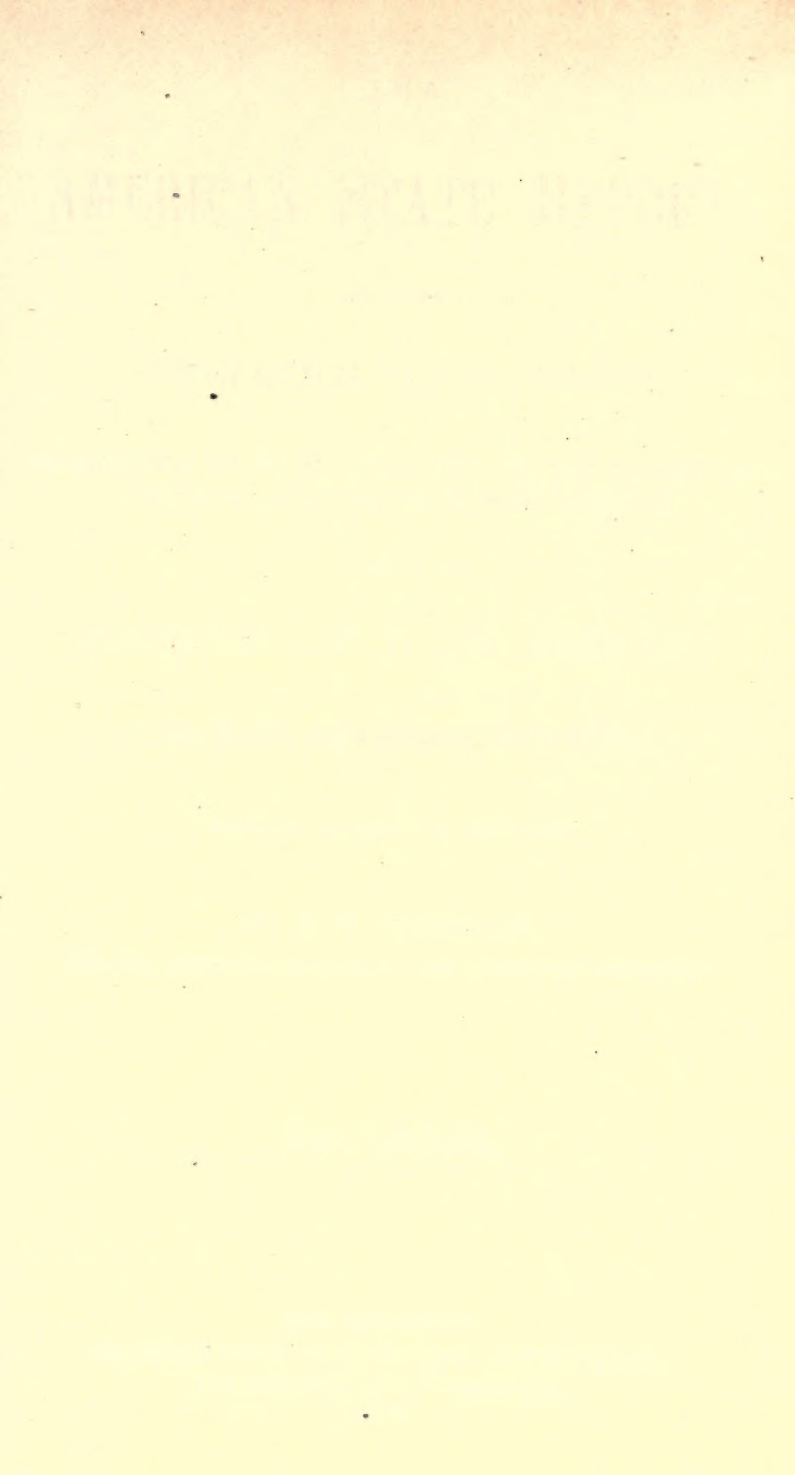
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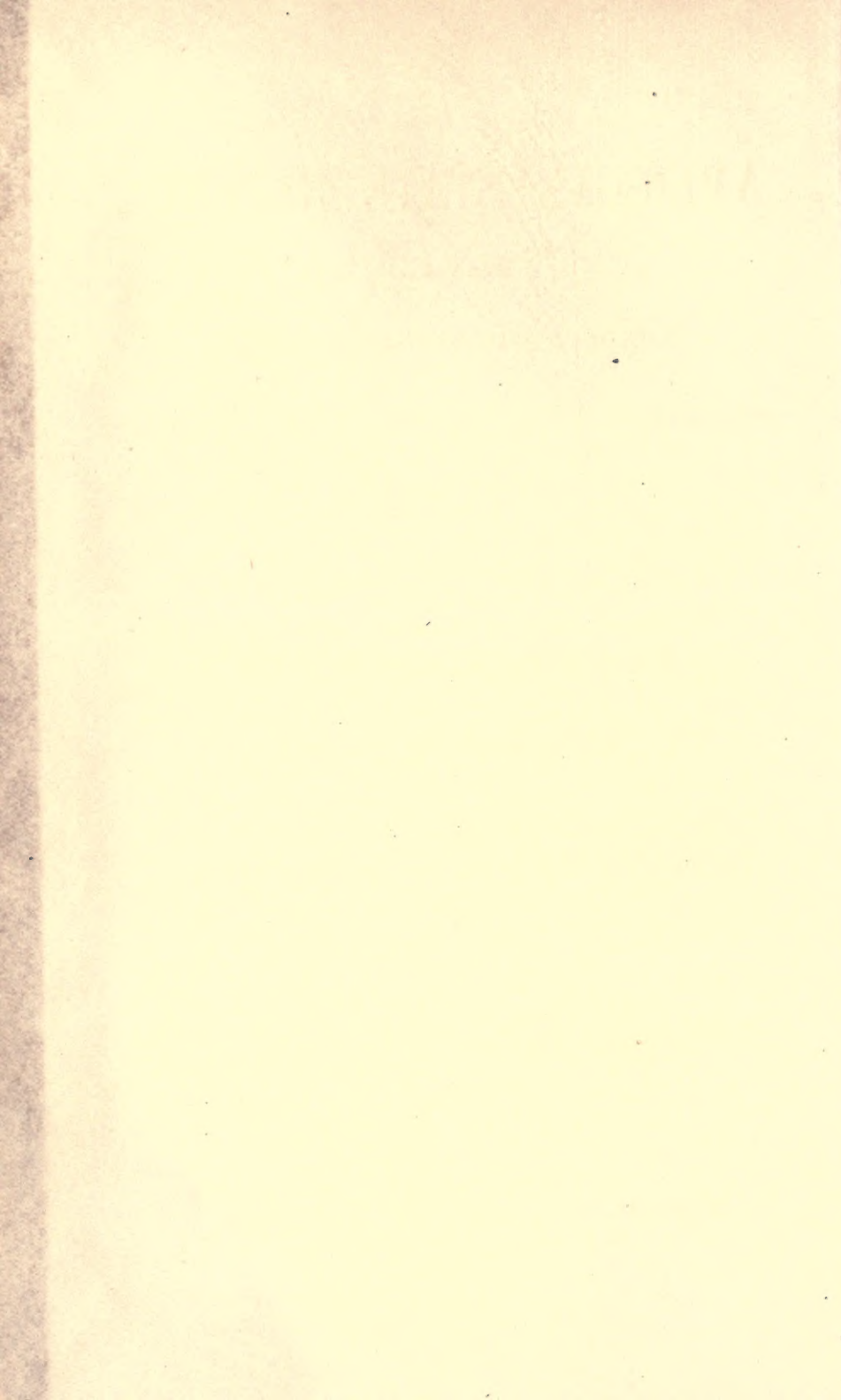
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SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
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DECIDED IN THE

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OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXXIII.

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VOL. LXXIII.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

JOHNSON v. BANK OF LAKE.

[125 CALIFORNIA, 6.]

LIMITATIONS OF ACTIONS—CONTRACT WITH CORPORATION—SHAREHOLDER'S LIABILITY.—If a corporation employs an attorney at law to defend an action brought against it, its liability upon the contract is "created" when the services have been fully performed, and not at the time of the employment. Hence, where the liability of a shareholder in such corporation is dependent, under the statute, upon the amount of stock owned by him at the time the liability was "incurred," the liability of one who was a stockholder when the services in question were rendered, is not barred by the statute of limitations until the expiration of the statutory period from the time that the liability was created.

Garret W. McEnerney and T. J. Sheridan, for the appellant.

M. S. Sayre, for the respondent.

7 HENSHAW, J. Plaintiff, by appropriate allegations, sought to enforce a liability against the Bank of Lake, as a stockholder of the Lakeport Agricultural Park Association. By his first cause of action he charged for the value of his services as an attorney at law, rendered to the association at its request, in defense of an action in which it was a defendant, "in consideration of which the Lakeport Agricultural Association promised, undertook, and agreed to pay the plaintiff the reasonable value of the said services whenever thereto requested." The second cause of action charged for moneys expended by plaintiff for the association at its request and under its promise of repayment. The third cause of action was for the value of the

services of J. J. Bruton, rendered under a like employment as attorney at law in the same litigation, Bruton's claim having been assigned to plaintiff. The court found the employment, the value of the services, and the expenditures of moneys all as pleaded in the complaint, but it found that defendant's plea of the statute of limitations was a good plea, "because the employment of plaintiff and of Bruton to perform the services which they did perform was made prior to the time when the ^s defendant became a stockholder, although the services were actually performed and rendered after the date when defendant became such stockholder." Judgment, therefore, passed for the defendant, saving as to a small portion of the money expended. As to this money no question is made upon this appeal.

Section 359 of the Code of Civil Procedure provides that an action against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the liability was created. Section 322 of the Civil Code declares that the liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred. The point here presented then is: When, under this contract, was the liability of the corporation created? If it was created at the time of the employment, as the trial court held, its judgment is admittedly proper. If it was created at the time when the services were fully performed, then the defendant corporation is liable in the amount sued for. In *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, this court had occasion to construe a contract of the city of Fresno, which was to continue for five years, and which involved the expenditure of four thousand nine hundred dollars per annum, payable quarterly. It was called upon to interpret the contract under the provisions of the constitution prohibiting cities from incurring indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, in connection with the charter of the city, which declared: "The trustees shall not create, audit, allow, or permit to accrue any debt or liability in excess of the available money in the treasury." It was contended on behalf of the city, as it is contended by respondents here, that the liability was created and incurred at the time when the contract was entered into. But the conclusion reached and expressed by this court was that: "At the time of entering into the contract no debt or liability was created for the aggregate amount of the installments to be paid under the contract,

but that the sole debt or liability created was that which arose from year to year in separate amounts as the work was performed." To the same effect is *State v. McCauley*, 15 Cal. 429. In accordance with ⁹ this same construction may be cited *Garri-son v. Howe*, 17 N. Y. 458. In each case the time of the creation of the liability is to be determined by the conditions of the contract itself. In the case at bar, it is apparent that the association's liability to pay arose only after performance by the attorney of the requested services. Before the services had been performed the attorney could no more have exacted payment under the contract than could McBean, in advance of his rendition of the services, have required from the city of Fresno the aggregate amount of payments contemplated by his five years' contract.

The judgment appealed from is therefore reversed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—LIMITATIONS OF ACTIONS.—In California, an action to enforce the liability of stockholders of a corporation for a corporate debt must be brought within three years after the cause of action accrues: *Notes to Wells v. Black*, 59 Am. St. Rep. 167; *Corning v. McCullough*, 49 Am. Dec. 310. The statute of limitations begins to run from the time that the debtor is subject to be sued: *Winchester etc. Turnp. Co. v. Wickliffe*, 100 Ky. 531, 66 Am. St. Rep. 356; and not before that time: *Note to Kauss v. Rohner*, 51 Am. St. Rep. 764. Compare note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 872.

GRIMBLEY v. HARROLD.

[125 CALIFORNIA, 24.]

INSURANCE—MUTUAL BENEFIT SOCIETIES—CONTRACT OF MEMBER TO DISPOSE OF BENEFITS—EFFECT OF.—A valid contract, whereby a member of a benefit society, such as the Ancient Order of United Workmen, assumes to dispose of his interest in the beneficiary fund of the order, virtually the proceeds of a policy of life insurance, and agrees not to change the beneficiary, upon the consideration that the latter will pay all future dues and assessments, and take care of him, is effectual as against a subsequent attempt of the member to violate or annul the contract by changing the beneficiary, where the contract is not in conflict with the lawful conditions upon which the order grants the insurance.

INSURANCE—MUTUAL BENEFIT SOCIETIES—PROPERTY RIGHTS—POWER TO OUST COURTS OF JURISDICTION.
 A certificate of a benefit society, such as the Ancient Order of United

Workmen, is, like a policy of insurance, evidence of a property right; and, while it is competent for the order to prescribe certain regulations concerning the disposition of such right by contract, it is not competent for the order to confer upon its internal judicatories the sole power of determining the fact and consequences of any disposition the member may make, or attempt to make, of it.

INSURANCE—MUTUAL BENEFIT SOCIETIES—BOARD OF ARBITRATION—RESORT TO COURTS.—The rights of a beneficiary in a certificate issued by a benefit society, like that of the Ancient Order of United Workmen, are not concluded by a decision of the board of arbitration of the order, particularly where he is not a member of the order. Hence, he is not bound to appeal from such decision to the grand lodge, but may at once invoke the aid of a court of law to enforce whatever contract rights he may have under the certificate.

INSURANCE—MUTUAL BENEFIT SOCIETIES—EQUITABLE RIGHT TO PROCEEDS OF CERTIFICATE—ESTOPPEL. If a member of a benefit society, such as the Ancient Order of United Workmen, violates his contract with a beneficiary by changing the beneficiary, and demands a return of the certificate for the purpose of having the change made, which demand is refused, the second beneficiary does not have, as against the first beneficiary, a superior equitable right to receive the money; and the first beneficiary is not estopped by a failure to disclose to the second beneficiary particulars of which the latter did not inquire, where the second beneficiary knew, when the demand was made, that the first beneficiary held the certificate and denied the right of the member to deprive him of its benefits.

INSURANCE—MUTUAL BENEFIT SOCIETIES—ACTION ON CERTIFICATE BY BENEFICIARY—EVIDENCE.—In a controversy over the right to the proceeds of a benefit certificate, where the member agreed that the beneficiary named therein should receive the insurance, but afterward violated his contract by appointing another beneficiary, evidence that the beneficiary first named, in a suit brought by him, bestowed care on the member during his illness, and that this was part of the consideration for the agreement that such beneficiary should have the insurance, is relevant and admissible, though the complaint contains no allegation that such attentions were to be rendered. Such evidence tends to exhibit the relative situation of the parties toward each other, and to make more probable the matter which is averred, namely, that the beneficiary should, in consideration of the payment of the member's dues and assessments, receive the insurance.

APPEAL—FINDINGS—PREJUDICIAL ERROR.—When the facts found within the issue, in an action on a contract, are sufficient evidence of a valid contract, no prejudicial error is shown, even if there are findings beyond the issue.

APPEAL—REVIEW OF DISCRETION—CROSS-EXAMINATION.—As the extent to which cross-examination shall be carried is, in some degree, a matter of discretion with the trial court, its ruling thereon, where no abuse of discretion is shown, will not be disturbed on appeal.

Budd & Thompson, for the appellant.

C. B. Parkinson, for the respondent.

27 BRITT, C. There was evidence at the trial of this action that in the summer of the year 1894, the plaintiff, a young

woman, upon the request and at the expense of one Frederick Shelton, her uncle, left her home in England and came to this state, where said Shelton resided, for the purpose of caring for him in sickness; he proposing, in rather indefinite terms, to make some provision for her, saying, among other things, that he had some papers he wanted her to have. Shelton was then and had been for several years previously a member of the society called the Ancient Order of United Workmen, which has for one of the purposes of its organization the payment of a sum of money—two thousand dollars—upon the death of any member, “to such person as he may while living direct, according to the rules, laws, and regulations of the order?”; he held the usual “beneficiary certificate,” declaring his right of membership in said order and his right to designate the beneficiary of said fund. The rules, laws, and regulations aforesaid allow any member to change his direction for payment of such money, and on August 16, 1894, Shelton surrendered the said certificate previously issued and obtained from the defendant Grand Lodge of said order the issuance of another, wherein he designated the plaintiff as the beneficiary thereunder; which new certificate he at once delivered to the plaintiff. Regarding this transaction, the plaintiff alleged in her complaint, and the court found in substance, on sufficient evidence, that at and prior to the time of the delivery of such certificate to plaintiff it was agreed between Shelton and herself that she should thereafter pay all his dues to said order and all assessments levied by it against him, and that she should be the beneficiary to receive said sum of two thousand dollars at his death, and that he would not change the certificate in that behalf; that plaintiff accordingly did pay such dues and assessments after said August 16, 1894, and until July, 1895, when the order declined to receive the same from her further, for the reason that Shelton, in April, 1895, had again changed the designation of the beneficiary of his insurance, naming the defendant Harrold, and had procured a new certificate to be issued in Harrold’s favor, although plaintiff did not consent ²⁸ to such change and still held the certificate of August 16, 1894, and refused to surrender the same. The court also found, though this circumstance was not alleged in the complaint, that plaintiff further undertook, as part of her said agreement with Shelton, that she would personally care for him as long as she was able, and that she performed this promise except as excused or prevented by Shelton from so doing. There were other findings that besides

procuring the new beneficiary certificate of April, 1895, in Harrold's favor, Shelton also conveyed to him other property, real and personal—all upon certain trusts which Harrold undertook to execute; that out of funds thus derived Harrold paid certain debts of Shelton and his dues and assessments as a member of said order in July and August, 1895; and that Harrold had no knowledge of any contract between Shelton and plaintiff respecting said insurance money until after Shelton's death, but did know of her refusal to surrender the certificate she had received from Shelton or to consent to his proposed change of the beneficiary thereof. Shelton died August 18, 1895.

Among the rules of said order it is provided that a board of five members, to be appointed by the grand master workman, shall constitute "a board of arbitration to hear and determine all controverted questions which may arise as to the disbursement of the beneficiary fund under the control of the grand lodge, . . . and as to the liability of the grand lodge for any claim made against it by those claiming to be the beneficiaries of deceased members, and also as to who are entitled as beneficiaries when conflicting claims are set up"; and that the decision of said board shall be conclusive, subject to appeal to the grand lodge or supreme lodge, "it being the purpose of this provision that all these rights shall be thus determined without recourse to the courts of law." After Shelton's death plaintiff presented to said Grand Lodge her claim for payment of the said certificate of August 16, 1894, and her protest against payment of the subsequent certificate in favor of Harrold; whereupon, under the regulation just mentioned, the grand master appointed a board of arbitration which heard such claim and protest and decided adversely to plaintiff. She took no appeal to any other tribunal of the order, but instead brought this action against said Grand ²⁰Lodge and Harrold. The answer of the Grand Lodge herein is, in effect, that it holds the sum of two thousand dollars to be paid to the party which the court by its judgment may decide to be entitled to receive the same. Judgment went for plaintiff, requiring the Grand Lodge to pay the money to her, and declaring that defendant Harrold is not entitled to any part thereof. Harrold has appealed.

Decisions of the courts of other states differ regarding the effect to be given to the contract of a member in societies such as the Ancient Order of United Workmen, whereby he assumes to dispose of his interest in the beneficiary fund of the order—virtually the proceeds of a policy of life insurance; but the ques-

tion is hardly an open one here—so strong have been the intimations of this court that such a contract, when valid and not in conflict with the lawful conditions upon which the order grants the insurance, is effectual as against the subsequent attempt of the member to violate or annul it; and this must be held to be the law: *Jory v. Supreme Council L. of H.*, 105 Cal. 20, 29, 45 Am. St. Rep. 17; *Adams v. Grand Lodge A. O. U. W.*, 105 Cal. 325, 45 Am. St. Rep. 45; *Hoeft v. Supreme Lodge K. of H.*, 113 Cal. 91; *Leaf v. Leaf*, 92 Ky. 166; *Smith v. National Ben. Soc.*, 123 N. Y. 85; *Maynard v. Vandewerker*, 30 Abb. N. C. 134; 24 N. Y. Supp. 932. The case last cited, which is precisely in point here, was decided at special term, and the judgment was reversed on appeal upon a question of fact; but the opinion then delivered proceeds on the assumption that the law held by the trial judge was correct: *Maynard v. Vandewerker*, 27 N. Y. Supp. 714, 76 Hun, 25.

Appellant urges that, as plaintiff took no appeal from the decision of the board of arbitration, she is concluded thereby; that this is the effect of the laws of the order under which the beneficiary certificate was issued. But the certificate issued to Shelton, like a policy of life insurance, evidenced a valuable right of property, and we cannot concede that it was competent for the order, while clothing him with such right, to confer upon its internal judicatories the sole power of determining the fact and consequences of any disposition he might make or attempt to make of it. Suppose Shelton had been permitted to designate a beneficiary by last will and testament; it would seem to ³⁰ be an extraordinary proposition to say that the society could confer on its own tribunals exclusive power to determine—in relation to the proceeds of the certificate—whether any will had been executed, allow or refuse it probate, and decide how it should be construed. The case before us is in principle but little different. The order in this instance has with entire fairness declared its indifference between the contending claimants, but the appellant, Harrold, insists that to entitle her to recover as against him the plaintiff must make a case on which she would be entitled to recover against the order, and cites some authorities to that effect. However that may be, we think the questions whether Shelton contracted with the plaintiff, as she alleged, and, if he did, what right she acquired in the subject of the contract, pertained to the jurisdiction of the courts of the political sovereign, the state, and it was not compulsory upon her to resort elsewhere: *Burlington etc. Relief Dept. v.*

White, 41 Neb. 547, 43 Am. St. Rep. 701; Daniher v. Grand Lodge A. O. U. W., 10 Utah, 110; see, also, Whitney v. Association, 52 Minn. 378; Bacon on Benefit Societies, secs. 71, 450; Moore v. Woolsey, 4 El. & B. 243. Nothing to the contrary was held in Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193; that was a dispute between a member and the organization concerning rights founded immediately on the contract of membership, and which the member had, by assenting to its rules, agreed to submit to its tribunals. The plaintiff here is not a member of the order, and her cause of action contains an element wholly foreign to its laws, viz., her contract with Shelton.

It is contended, however, that plaintiff voluntarily left her demands to arbitration, and must abide by the result, even though the rules of the order in that behalf were not binding on her. The assumption of fact for this argument fails; the plaintiff presented to the Grand Lodge her demand for payment to herself and protest against payment to Harrold; this was a proper course, whatever other proceedings she designed to take; the Grand Lodge did not respond directly; her demand and protest were assigned for hearing to the board appointed by the grand master; although called a board of arbitration, it lacked, as concerned the plaintiff, a prime essential of a legal body of arbitrators in that she had no voice in selecting its members; ³¹ it was really but a committee upon which, under the rules of the order, was devolved the duty of answering plaintiff's demand; the fact that she produced evidence before it to support her claims could not convert the hearing into an arbitration, any more than if she had presented her proofs before the Grand Lodge itself: Compare Kumle v. Grand Lodge A. O. U. W., 110 Cal. 204.

Appellant claims that the court should have held his equitable right to receive the money to be superior to that of plaintiff. This is asserted mainly on the circumstance that plaintiff did not inform him of her contract with her uncle at the time the latter demanded the surrender of the certificate she held in order that a new one might be issued to Harrold. But it appears that Harrold knew that plaintiff held the certificate and that she denied the right of her uncle to deprive her of its benefits; this was sufficient to put him on inquiry as to the ground of her claim, and we cannot hold that she is estopped by failure to disclose to him particulars of which, so far as appears, he did not inquire.

It is objected that the court erred in receiving evidence that the plaintiff bestowed care on her uncle during his illness, and that this was part of the consideration for his agreement to make her the beneficiary of his insurance—on the ground that the complaint contained no allegation that she agreed to render such attentions; it is said also that the finding on this subject was beyond the issues. But the evidence tended to exhibit the relative situation of the parties toward each other and hence to make more probable the matter which was averred, viz., that Shelton, in consideration of her payment of his dues and assessments, agreed that she should receive the insurance; it was therefore relevant. And if the finding was beyond the issue—which we do not decide—yet, as the facts found within the issue were sufficient evidence of a valid contract, the appellant is not injured.

Plaintiff testified that she paid her uncle's dues and assessments, as she agreed with him, from her earnings at domestic service. On cross-examination, counsel sought to ascertain whether she had funds sufficient for this purpose, with a view apparently of showing that the money she paid was really furnished ³² by Shelton; she testified that she took some instruction in music, but paid for it out of her own money; counsel inquired how much she paid for the lessons, and the court sustained an objection to the question. Perhaps the question was proper cross-examination in the abstract; but the ultimate matter to be developed by this line of inquiry was whether she paid the assessments from funds supplied for that purpose by her uncle, and upon this it appears that appellant's counsel did examine her fully and elicited quite explicit answers; the extent to which cross-examination shall be carried is in some degree a matter of discretion with the trial court, and we cannot say that in this instance its discretion was abused. Other points argued are not important. We discover no material error in the record. The judgment and order denying a new trial should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

INSURANCE — MUTUAL BENEFIT SOCIETIES — CERTIFICATE AS CONTRACT OF INSURANCE.—The Ancient Order of

United Workmen, so far as it is engaged in the business of life insurance, is to be treated in law as a mutual life insurance company; and a certificate of membership and insurance therein is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties: *Chartrand v. Brace*, 16 Colo. 19, 25 Am. St. Rep. 235. See, also, the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 544, on features of the law specially applicable to mutual or membership life or accident insurance.

INSURANCE—MUTUAL BENEFIT SOCIETIES—CHANGE OF BENEFICIARIES.—A beneficiary, designated as such in a certificate of membership in a mutual benefit society, does not thereby acquire any vested rights so as to defeat a subsequent change of beneficiaries effected at the instance of such member, unless the original beneficiary was made such on account of some contract, or has some equities recognized by the courts, and which it would be inequitable to disappoint: Note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 567.

INSURANCE—MUTUAL BENEFIT SOCIETIES—ARBITRATION—RESORT TO COURT—PROPERTY RIGHTS.—Courts have no authority to interfere with the action of voluntary and unincorporated associations where no right of property is involved, but they will not hesitate to take hold of, and exercise jurisdiction over, cases in which such an association is a party, and where some civil or property right is involved: *Kearns v. Howley*, 188 Pa. St. 116, 68 Am. St. Rep. 852, and monographic note thereto on the jurisdiction of equity over voluntary unincorporated associations, in which the jurisdiction of courts over benefit and benevolent societies is discussed. It is not possible by contract, or by the constitution or by-laws of an association to deprive a member having a cause of action against it of all right to resort to the courts: See monographic note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 206, on the remedies of members of fraternal and other associations; and compare the note to *Kearns v. Howley*, 68 Am. St. Rep. 865. To secure property rights or to enforce money demands against social or beneficial organizations a member thereof may, in the first place, prosecute his claim in the civil courts, unless the constitution or by-laws of the organization expressly provide otherwise: *Roxbury Lodge v. Hocking*, 60 N. J. L. 439, 64 Am. St. Rep. 596. Compare note to this case. An agreement, contained in a certificate of membership in a mutual accident association, that the rights and obligations of the parties to the contract, which makes provision for the payment of a certain sum of money, upon a specified contingency, shall be determined by arbitration, and that no action shall be maintained on the contract, does not oust a court of jurisdiction, and is no bar to such an action: Note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 547.

APPEAL.—A FINDING OUTSIDE OF ANY ISSUE presented in the case must be disregarded: *Moynihan v. Drobaz*, 124 Cal. 212, 71 Am. St. Rep. 46.

APPEAL—DISCRETIONARY ACTION.—Matters within the discretion of the lower court will not be interfered with in the appellate court, when no abuse of discretion is claimed: *Winslow v. Minnesota etc. R. R. Co.*, 4 Minn. 313, 77 Am. Dec. 519.

MOORE v. HOFFMAN.

[125 CALIFORNIA, 90.]

PROBATE HOMESTEADS—PURPOSE OF, AND RESPECTIVE RIGHTS OF WIDOW AND CHILDREN IN.—A probate homestead is for the benefit of minor children, if there are any, as well as for the surviving husband or wife; and the homestead right continues in favor of any one of the family for whom it was created as long as he or she asserts it and remains in a position to assert it, that is, so long as he or she sees fit to continue the homestead as a family home. The surviving husband or wife may occupy it as such after the children have attained majority, but when the children arrive at majority their interest in the homestead as a homestead ceases, for they no longer constitute a part of the family, and whatever property rights they thereafter have in the land covered by the homestead are in the nature of those of remaindermen or reversioners.

PROBATE HOMESTEADS—TENANCY IN COMMON WITH WIDOW—GRANTEE OF CHILDREN'S INTEREST.—The rights of a probate homestead claimant cannot be affected by an instrument in writing to which such claimant is not a party. Hence, after such a homestead has been set apart to a widow and children, the grantee of the children, after they have arrived at the age of majority, cannot legally go into possession of the homestead as a tenant in common with the widow. Besides this, it would violate the very purpose for which homesteads are created, to permit the children, after majority, to sever or divert the homestead from full occupancy and enjoyment as a family home, so long as the widow sees fit to occupy it as such.

Charles B. Younger, for the appellant.

Frank M. Stone, for the respondents.

⁹¹ McFARLAND, J. Plaintiff avers in her complaint that she is the owner of the undivided one-half of certain described land, and is entitled to the possession thereof, and that defendants are unlawfully in possession of said land; and she prays for the recovery of the possession of the land from defendants, with damages, etc. The defendants, in their answer, admit that plaintiff is the owner and entitled to possession of the undivided one-third of the premises (and afterward, at the trial, admitted that she was entitled to one-half); but they say that the defendant Alice is the owner of an undivided interest in the land as tenant in common with plaintiff, and they claim only the right to hold possession jointly with plaintiff as tenant in common. The jury found for the defendants, for whom judgment was rendered; and plaintiff appeals from the judgment and from an order denying her motion for a new trial.

Appellant makes many points for a reversal which, under our view of the case, need not be discussed; for, waiving all con-

tentions of appellant as to minor matters, the court erred as to the leading questions in the case which go to the real merits of the controversy.

William H. Moore died intestate seized of the land in question, leaving a widow, the appellant herein, and three minor children, Charles Moore, Stella Moore, and William M. Moore. Afterward, and during the administration of his estate, to wit, on April 26, 1881, the court in which the administration was pending duly set apart the land in question here as a probate ⁹² homestead to the appellant, as widow, and the minor children—the order setting it apart declaring that one-half should go to the widow and the other half to the children, or one-sixth to each of them. On September 11, 1889, Charles Moore, one of the children, who had then attained his majority, conveyed by deed to Alice Hoffman, one of the respondents, an undivided two-fifteenths of an undivided one-sixth of the land. And under this deed the said Alice, and the other respondent, her husband, William C. Hoffman, who was also made a party defendant, claim the right to possession as tenants in common with appellant. It does not expressly appear whether or not the other two children had attained majority at the time this suit was commenced, although, according to certain dates which the record shows, they probably had; and, for the purposes of the case, we will assume that all the children were of legal age at the time of the commencement of this action, as that view is the most favorable to respondents.

The question in the case presented by the foregoing facts is, Can the grantee of one of the children in a case like this legally go into possession of the homestead as the tenant in common with the widow? The question arose in various ways, and principally upon the instructions of the court to the jury. The court instructed that if Charles Moore deeded an interest to Alice Hoffman, as above stated, then “that unless it had been shown by evidence that Alice Hoffman has since disposed of her interest in said land, that she is and has been since said date a tenant in common with plaintiff, and you must find for the defendants,” and that her husband had a right to be in possession with her; and refused to instruct that neither of the children “could give any right to any person to the possession of said homestead against said plaintiff.”

The purpose of a homestead is to secure a home to those clothed with a homestead right—to each and all of them; and the power of a stranger to enter into the possession of the land,

and, as a tenant in common, to interfere with its occupancy and control by the homestead claimants, and to have it partitioned, or sold if division be impracticable, would be inconsistent with the very nature of a homestead, and violative of the very purpose for which homesteads are created. Probate homesteads ⁹³ are, of course, for the benefit of minor children, when there are such, as well as for the surviving wife or husband, and our attention has not been called to any adjudication in this state where in such a case the grantee of a child has undertaken to disturb the possession of the other homestead claimants; but the principle which is clearly applicable to the case at bar was declared and applied, where the party asserting the right of possession was the grantee of the widow, in *Hoppe v. Fountain*, 104 Cal. 94. In that case, where a probate homestead had been set apart to the widow and minor children, the widow had mortgaged all her interest in the homestead premises, and it was held that a purchaser at the foreclosure of the mortgage had no right to possession, as against the minor children, until their homestead rights had ceased, which would occur at their majority. The court announced the principle above stated as follows: "The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it." Counsel for respondents seems to think that the *Hoppe* case decides that the rights of all the homestead claimants ceased when the children arrived at majority, because the court said that the premises were to "remain as a homestead without any power in either of the parties interested to destroy its quality as a homestead until after all of the children shall have arrived at majority," and "it must remain intact until the youngest child has reached its majority." But this language was used in a case where the rights of the minor children were being asserted as against the act of the widow—not where the rights of the widow were being asserted as against the acts of the children. When the children arrive at majority their interest in the homestead, as a homestead, ceases, for they no longer constitute a part of the family, and whatever property rights they thereafter have in the land covered by the homestead are in the nature of those of remaindermen or reversioners. After their majority the widow, being the only homestead claimant left, could, of course, dispose of her interests in the land, because there would then be no other homestead claimant to contest her right to do so; and it was in view of this situation that the court said in the *Hoppe*

case that she could not destroy the homestead while any of the children ⁹⁴ were minors. But exactly the same principle applies in favor of the widow as against the grantee of a child; such grantee cannot disturb her possession until her homestead right has been extinguished either by her own act or by operation of law, and it cannot be extinguished by any act of one or all of the children, either before or after their majority. The rights of a homestead claimant cannot be affected by an instrument in writing to which such claimant is not a party: See *Phelan v. Smith*, 100 Cal. 166. The governing principle is, that the homestead right continues in favor of any one of the family for whom it was created as long as he or she asserts it and remains in a position to assert it.

This rule has been declared in other states, for, while not many of their statutory provisions about homesteads are exactly like ours, still they are sufficiently similar to make the principle applicable: See cases cited in opinion of Harrison, J., in *Hoppe v. Fountain*, 104 Cal. 94. In *Keyes v. Hill*, 30 Vt. 768, the supreme court of Vermont declares the law as follows: "We think the clear design of the law is to continue the homestead entire, as the home of the widow, or of the widow and children constituting the family at the decease of the husband, house-keeper, or head of the family, and that no rights of the children become operative to sever or divert such homestead from full occupancy and enjoyment as a family home, as long as the widow, or widow and children, see fit to continue it as such family home."

The judgment and order appealed from are reversed.

Temple, J., and Henshaw, J., concurred.

HOMESTEADS—RIGHTS IN, OF WIDOW AND CHILDREN.—A homestead is secure to the use of the family as long as the family continues to exist, and the head thereof to occupy the homestead: *Hoffman v. Neuhaus*, 30 Tex. 633, 98 Am. Dec. 492; but grown-up married children are not included in a family: *Note to Wade v. Jones*, 61 Am. Dec. 587; and children who have attained the age of majority cannot claim partition of the homestead as against the mother and minor children who continue to occupy it: *Hoffman v. Neuhaus*, 30 Tex. 633, 98 Am. Dec. 492. Compare note to *Ex parte Worley*, 54 S. C. 208, 71 Am. St. Rep. 788, showing that, after all the children have attained their majority, their homestead rights cease, and that the widow is then entitled to the exclusive use and occupancy of the homestead.

BERKA v. WOODWARD.

[125 CALIFORNIA, 119.]

CONTRACTS—VALIDITY—FORBIDDEN CONTRACTS INCLUDE IMPLIED CONTRACTS.—When a contract is expressly prohibited by law, no court will entertain an action upon it, or upon any asserted rights growing out of it, and this rule applies to implied as well as to express contracts.

CONTRACTS—PENALTY FOR ACT—ILLEGALITY.—When a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it.

MUNICIPAL CORPORATIONS—FORBIDDEN CONTRACT—RECOVERY UPON IMPLIED CONTRACT.—Under a city charter, which forbids a member of the city council from being directly or indirectly interested in any contract made by them, and statutes which forbid city officers from being interested in such contracts, and which impose a penalty for such an act, a member of a city council who has expressly contracted with it for the sale of lumber and materials to the city, cannot recover their value upon an implied contract.

CONTRACTS OF PUBLIC OFFICERS—RECOVERY UPON A QUANTUM MERUIT OR QUANTUM VALEBAT.—In cases where the contracts of public officers, with their counties or municipalities, have not been expressly forbidden by law, the demands of public policy are sometimes held to be satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a quantum meruit or quantum valebat. This, however, is not true where the contract is *malum in se*, or is against the express prohibition of the law, as the law will not imply a promise to pay for benefits received under a contract expressly prohibited by law.

MANDAMUS—CITY TREASURER—ILLEGAL DEMAND APPROVED BY CITY COUNCIL.—The duty of a city treasurer is to pay only legal demands against his funds. He cannot, therefore, be compelled, by mandamus, to pay a warrant issued for the value of lumber and materials sold to the city by a member of the city council, although the demand has been allowed by the city council, for such a claim is not a legal one, and its allowance by the council does not give it any validity not otherwise possessed.

O. O. Webber, city attorney, and J. Leppo, for the appellant.

D. R. Gale and Campbell & Campbell, for the respondent.

121 HENSHAW, J. This is an appeal from a judgment in mandate ordering the treasurer of the city of Santa Rosa to honor and to pay two warrants issued in favor of plaintiff by the common council of the city. The warrants were in payment of lumber and materials "had and received by the city from Berka." At the times when the material was supplied, at the times when Berka presented his bills and demands for payment, and at the time when the city council allowed and approved his claims, Berka was an officer of the city and a member of its

common council. These facts appear by the petition. The defendant interposed a demurrer, both general and special. This demurrer was "overruled without leave to answer," and a peremptory writ of mandate was ordered to be issued.

The question of first importance presented upon this appeal is that of the right of an officer of the city to recover upon an implied contract with the municipality. The following provisions of the law, and of the charter of the city of Santa Rosa, have direct bearing upon this consideration:

"No councilman to be directly or indirectly interested in any contract made by them, or in any pay for work done under their direction or supervision": Charter of Santa Rosa, Stats. 1875-76, p. 255.

"All bills, claims, and demands against the city shall be . . . filed by the city clerk, who shall present it to the council, and they shall allow or reject the same in whole or in part": Charter of Santa Rosa, Stats. 1875-76, p. 251.

122 "Members of the legislature, state, county, city, and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members": Pol. Code, sec. 920.

"State, county, township, and city officers must not be purchasers at any sale, nor vendors at any purchase made by them in their official capacity": Pol. Code, sec. 921.

"Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein": Pol. Code, sec. 922.

"Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing script or other evidence of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison not more than five years, and is forever disqualified from any office in this state": Pen. Code, sec. 71.

"That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or 3. Otherwise contrary to good morals": Civ. Code, sec. 1667.

"The consideration of a contract must be lawful within the meaning of section 1667": Civ. Code, sec. 1607.

"If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void": Civ. Code, sec. 1608.

It would seem that the need of discussion is foreclosed by the mere quotation of our express laws, but respondent contends, and in his contention prevailed in the trial court, that these provisions have no application to an implied contract such as this admittedly is, and that in the case of implied contracts which are not *malum in se*, even though they may be against public policy, the rule is, that if the consideration has passed—if the contract upon the one hand has been wholly executed—the party who has so performed will be allowed a recovery upon quantum meruit or quantum valebat, as the case may be. The importance of this question, the right of an officer of the city to ¹²³ recover upon an implied contract with his municipality, its gravity and far-reaching consequence, demand something more than a passing consideration.

By subdivision 1 of section 1667 of the Civil Code reference is had to contracts expressly prohibited. These will be discussed hereafter. Within subdivisions 2 and 3 of the same section are embraced the multitude of contracts which, though not expressly prohibited, are refused recognition upon grounds of public policy. These contracts, in contemplation of their subject matter, may be divided into two distinct classes; the first where the consideration is base and against good morals, *malum in se*; the second, where the consideration is in itself lawful, but where the mode is unauthorized, or where, because of some fiduciary relation between the parties, the law will not permit the contract to be made, nor countenance it when made. As to the first it is said in *Blatchford v. Preston*, 8 Term Rep. 95: "A plaintiff cannot recover in a court of justice whose cause of action arises out of a contract between him and the defendant in fraud or to the prejudice of third persons." Of the second, Lord Mansfield and the court of king's bench, in *Jones v. Randall*, Cowp. 39, declared: "Many contracts which are not against morality are still void as being against the maxims of sound policy." The first class of contracts embraces the infinite number of those made to further crime, or to interfere with the administration of the law, or to obstruct the course of justice, all contracts affecting the rights and prerogatives of the government, as well as the personal rights of the citizen. In the second class no baseness is inherent in the essence of the contract, but there is either some defect in the mode of creation or the

manner of performance, or some incapacity in one or the other of the parties because of nonage, mental disability, or the fiduciary relation which they sustain to each other. Within this second class, as has been said, are the contracts of one who stands in a fiduciary relation to another with that other. Because of the tendency to abuse, the temptation to take undue advantage, these contracts, even when not expressly prohibited by law, are still looked upon with disfavor, and they may be avoided at the instance of the other party in interest; but where the trustee or other fiduciary agent has fully carried out ¹²⁴ the terms of the contract, the contract itself being fair, public policy, which is not punitive, is satisfied to leave the right of rescission to the other party. If he shall elect to rescind, he does so upon the equitable condition of restoring what he has received. If, however, he chooses to retain the consideration, he is not bound by the terms and conditions of the contract, but the courts permit an action to establish and to recover the reasonable value of the thing sold or the service rendered. Such, it may be said, is the general rule, but in this state the line has been more closely drawn. Such contracts are against public policy. Being against public policy, the making of them is not to be encouraged. But to permit a profit is thus to encourage them. Therefore, in this state, when a recovery is permitted, it is not for the reasonable or market value, which naturally includes within it the contemplation of a profit, but, when possible, the recovery is limited to the actual cost: *Fox v. Hale* etc. Min. Co., 108 Cal. 369.

Where contracts of public officials with their counties or municipalities, have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a quantum meruit or quantum valebat: *Spearman v. Texarkana*, 58 Ark. 348; *Pickett v. School Dist.*, 25 Wis. 551, 3 Am. Rep. 105; *Concordia v. Hagaman*, 1 Kan. App. 35; *Gardner v. Butler*, 30 N. J. Eq. 702; *Call Pub. Co. v. Lincoln*, 29 Neb. 149; *Mayor etc. v. Huff*, 60 Ga. 221; *Currie v. School Dist.*, 35 Minn. 163; *Mayor etc. v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670: But in no one of these cases, nor, indeed, in any case which has come under our observation, have the courts entertained any contract or any rights growing out of a contract, where either the consideration was base, or the

contract was against the express prohibition of the law. Thus in *Call Pub. Co. v. Lincoln*, 29 Neb. 149, the publishing company had sued the city to recover for printing. Bushnell was a stockholder in the plaintiff company, and was chairman of the city council's committee on printing during the time of the publications in question; the court held that the statute of Nebraska prohibiting ¹²⁵ officers from being interested in any contract with their municipalities referred to express contracts, that the contract under consideration was an implied contract. It therefore concluded that the contract was not one expressly prohibited by law, and proceeded to discuss and decide the question upon the grounds of public policy. In *Concordia v. Hagaman*, 1 Kan. App. 35, the prohibitory statute was "an act to restrain state and county officers from speculating in their offices." The contract there was a contract made by Hagaman when he was a member of the city council for the printing of the ordinances of the city. The court conceded that no recovery could be had if the contract were one expressly prohibited by law, but determined that the legislature had *ex industria* excluded municipal officers, and had limited the operation of the law to state and county officers. That being so, the contract was left to be considered upon the grounds of public policy alone. And in discussing that question the court says: "In considering the question of illegality of the contract, it is proper that a distinction be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties. . . . When the contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed, without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it;

nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled ¹²⁶ policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence, the courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals. When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."

This, then, is the undoubted rule, that when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent, for to permit this would be for the law to aid in its own undoing. Says the supreme court of the United States in *Bank of United States v. Owens*, 2 Pet. 527: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in *Coppell v. Hall*, 7 Wall. 542, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation." And in our own state it has been said (*Swanger v. Mayberry*, 59 Cal. 91): "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy." Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the ¹²⁷ consideration has passed or not. "The test," says Judge Dun-

can in *Swan v. Scott*, 11 Serg. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." And this must be so, for, while as a matter of private justice between individuals it would be but fair that one under such an illegal contract should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore, there is no place for equitable considerations, presumptions, or estoppels: *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699. *Ex turpi causa non oritur actio*. Whenever such a contract comes before the court the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found occasionally to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned.

The rule, further, is that where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it: *Swanger v. Mayberry*, 59 Cal. 91; *Santa Clara Mill etc. Co. v. Hayes*, 76 Cal. 390, 9 Am. St. Rep. 211; *Gardner v. Tatum*, 81 Cal. 370; *Morrill v. Nightingale*, 93 Cal. 458, 27 Am. St. Rep. 207; *Wyman v. Moore*, 103 Cal. 214; *Visalia etc. Co. v. Sims*, 104 Cal. 332, 43 Am. St. Rep. 105; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793.

Applying these principles to the contract before us, it is most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public¹²⁸ officer the entering into it. We can yield no assent to the contention that our laws apply only to express contracts. The statute itself is general in its terms. Both in the charter provision above quoted, and in section 920 of the Political Code, these officers are forbidden to be interested in "any contract"

made by them. The only difference between an express contract and an implied contract is that in the former all of the terms and conditions are expressed between the parties; in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties. Generally, express contracts with a municipality are made under the system of competitive bidding. Usually, this is made compulsory by law. To say that implied contracts were not prohibited would be to destroy the purpose and efficiency of the laws, and leave the people at the mercy of careless or unscrupulous officers. The case of *Smith v. Albany*, 61 N. Y. 444, is very similar to the one at bar. The council of the city, of which plaintiff was a member, appropriated two thousand five hundred dollars for defraying expenses of a Fourth of July celebration. Upon the day plaintiff furnished horses and vehicles for use in the celebration, and the fair value of their use was the sum of one hundred and thirty-nine dollars. The New York statute made it unlawful for a member of any common council to become a contractor under any contract authorized by the common council, and authorized such contracts to be declared void at the instance of the city. Here was an implied contract, but it was one prohibited by the statute law, as well as by considerations of public policy, and the plaintiff was denied any recovery. Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this, where the contractor is a member of the common council whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any situation where his personal interest will conflict with the faithful performance of his duty as trustee, and, it matters not how fair upon the face of it the contract may be, the law will not suffer him to occupy a position so equivocal and so fraught with temptation. Note the illustration here presented. This material was obtained from a member ¹²⁰ of the city council, and he, as a member of that council, sits in judgment upon the validity and amount of his own claim. If he does not act, still the city is deprived of its right to his services and knowledge in determining these very questions.

The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess: *Santa Cruz etc. Co. v. Broderick*, 113 Cal. 628. The duty of the treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally ren-

dered under a contract expressly prohibited by law: *Gardner v. Tatum*, 81 Cal. 370.

For the foregoing reasons the judgment is reversed, with directions to the trial court to sustain the general demurrer to plaintiff's complaint.

Temple, J., and McFarland, J., concurred.

ACTION UPON CONTRACTS FORBIDDEN BY LAW OR SUBJECT TO A PENALTY.—There can be no recovery upon a contract prohibited by law: *Persons v. Jones*, 12 Ga. 371, 58 Am. Dec. 476; *Linn v. State Bank*, 1 Scam. 87, 25 Am. Dec. 71. Business transactions in violation of law cannot be made the foundation of a valid contract: *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637. There can be no recovery on a contract the making of which is punishable by statute, although the statute does not, in express terms, prohibit the contract, nor pronounce it void: *Sandage v. Studabaker Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165; *Youngblood v. Birmingham etc. Co.*, 95 Ala. 521, 36 Am. St. Rep. 245; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671. Contracts violating a public statute are equally void whether the prohibition is express or implied; that is, whether the statute expressly prohibits the thing to be done, or only imposes a penalty on the person doing it: *Ohio etc. Trust Co. v. Merchants' etc. Trust Co.*, 11 Humph. 1, 53 Am. Dec. 742. Whether a contract is *malum prohibitum* or *malum in se*, is not material; for, in either case, the courts will not enforce it: *Ohio etc. Trust Co. v. Merchants' etc. Trust Co.*, 11 Humph. 1, 53 Am. Dec. 742.

MUNICIPAL CORPORATIONS—CONTRACTS FORBIDDEN BY LAW—RECOVERY UPON.—A contract made by a common council of a city in disregard of charter or statutory provisions cannot be the ground of any claim against the city: *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; note to *Leavitt v. Palmer*, 51 Am. Dec. 341. Officers cannot be interested in contracts pertaining to their office, and one who does an act forbidden by law cannot acquire any rights therefrom. A statute forbidding a county supervisor from being a party to, or in any manner interested in, a contract with the county for the purchase of any article whatever, applies to executed as well as to executory contracts: *Land etc. Lumber Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, and note.

PRESENTATION OF ILLEGAL CLAIMS AGAINST MUNICIPALITIES—ALLOWANCE OF, AND ITS EFFECT.—The allowance of a claim against a municipality, which is not authorized by law, is void, and does not estop the municipality from defending against it: See monographic note to *Commissioners v. Heaston*, 55 Am. St. Rep. 204, on the effect of the allowance or rejection of claims against counties and other municipal corporations.

MANDAMUS—PAYMENT OF WARRANTS.—*Mandamus* is the proper remedy to compel a city treasurer to pay warrants properly drawn upon him: *Savage v. Sternberg*, 19 Wash. 679, 67 Am. St. Rep. 751. Compare note to *Board of Commrs. v. Nichols*, 54 Am. St. Rep. 530. But where the right to have the thing done, which is sought for, is doubtful, the writ will be refused: *Mobile etc. R. R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556; *Swift v. Richardson*, 7 Houst. 338, 40 Am. St. Rep. 127.

ESTATE OF WALKER.

[125 CALIFORNIA, 242.]

FICTIONS OF LAW ARE INDULGED TO WHAT EXTENT—**MAXIM.**—All fictions of the law were created to enable the court to do justice. In *fictione juris semper aequitas existit*. But where the indulgence of a legal fiction will work injustice, its just limit has been found. A court will never allow it to work wrong and injustice.

FICTIONS OF LAW—DEBT OF ADMINISTRATOR.—The fiction of law that a debt of an administrator is to be considered as money on hand is based upon the supposed ability of the administrator to pay, and will not be allowed to work injustice against an insolvent administrator, by placing him in such a position that he might be charged with contempt or embezzlement for a failure to pay over moneys not received, and which he was unable to pay, or by charging his sureties with liability beyond the faithful discharge of the duties of the administrator.

EXECUTORS AND ADMINISTRATORS—DEBT OF INSOLVENT ADMINISTRATOR—LIABILITY FOR.—An administrator is to be charged with a personal debt due from him to the decedent as money on hand, but he, as administrator, and his sureties, are not bound for the debt any further than the administrator has had the means to pay. Hence, if he has, at all times since his appointment, been unable to pay anything on the debt, they are not liable at all.

EXECUTORS AND ADMINISTRATORS—DEBT OF INSOLVENT ADMINISTRATOR—FINAL ACCOUNT—EVIDENCE.—Upon the settlement of the final account of an administrator, who owes a debt to the decedent, there is no error in rejecting evidence that he has never, at any time, while administrator, had the means to pay the debt or any part thereof. The rights of the administrator, so far as to protect him against the consequences of charging him with the debt as money on hand, should be fixed by the decree settling the final account.

EXECUTORS AND ADMINISTRATORS—DEBT DUE FROM ADMINISTRATOR—FINAL ACCOUNT—DECREE.—THE PROPER FORM of a decree settling the final account of an administrator, who owed a debt to the decedent, but which, through the administrator's insolvency and inability to pay, has, without any fault of his, not been collected, is to charge the administrator with all moneys coming into his hands, including the debt due from himself, and then designate what portion of the entire sum consists of personal debts due the estate from the administrator, reported by him as cash on hand. This would protect the administrator, and the heirs could still proceed against him to collect the amount of his debt, if he acquires the means to pay it.

Appeal from a decree settling the final account of an administrator.

J. M. Thompson, for the appellant.

J. R. Leppo, for the respondent.

243 TEMPLE, J. The appellant, J. M. Walker, is the administrator of John Walker, deceased, and the appeal is from

the decree settling his final account as administrator, he having resigned his trust.

Before the death of John Walker appellant was indebted to him in the sum of eight thousand dollars, with interest, and alleges that he was at the time of his appointment, and ever since has been, entirely insolvent. Upon the settlement of his final account he offered evidence to prove his insolvency, and that the debt due from him to the estate remained uncollected without his fault. An objection was made to the offered evidence on the ground of incompetency, irrelevancy, and immateriality, and because the matter has been adjudicated and settled in the decree settling the annual account. For the purposes of this appeal, therefore, the evidence rejected must be deemed sufficient to establish the fact that the debt was uncollectible, and the controversy is as to its materiality. It may be remarked here, however, that insolvency might not be a reason for not ²⁴⁴ charging the administrator, even if the view contended for by the appellant be correct. One may be insolvent and yet be able to pay a particular debt. He may have some property and yet not enough to pay all his debts, and if in law he could prefer one creditor over another, which ordinarily he may, then it was his duty as administrator to pay this debt so far as he could.

The appellant admits that the general rule is that the administrator is to be charged with a debt due from him to the estate as money on hand, but contends that he may show, at least on his final settlement, that he has never at any time while administrator had the means to enable him to pay the debt or any part thereof. Further than this, unquestionably, the contention could not logically go, since, as he cannot sue himself, and yet it is his duty to collect the debt for the estate, he must be held officially liable for any money he could have so applied at any time during his official term. If he has not so applied it, he has not faithfully executed the duties of his trust according to law, and his sureties may also be held; for it is so nominated in the bond. But in this case it stands, for the purposes of this appeal, admitted that the administrator has at no time during his term had one dollar which he could have so applied; and the decree finds and adjudges that he has something over ten thousand dollars in cash on hand, which decree renders him liable to be imprisoned for contempt for not paying over as directed, and perhaps liable to prosecution for embezzlement, and constitutes an estoppel against his bondsmen, who will in consequence be required to pay money to the estate which has

not been lost by the administrator, and which otherwise the estate would never have received. They have not only become liable for the faithful discharge of his duties, which is all they expressly undertook, but also that the administrator is solvent and will pay his indebtedness to the estate.

In other words, they are held liable, although the administrator has in fact faithfully performed the duties of his trust according to law, because of a fiction of the law, that money due from such an administrator shall, as against him, be deemed money in hand. All fictions of the law, we have been taught, were created to enable the court to do justice, and where to indulge a fiction is to cause injustice, its just limit has ²⁴⁵ been found. In *fictione juris semper aequitas existit*. The courts have not considered the debt from an insolvent administrator or executor to the estate money in hand, for all purposes. When an application is made to sell property to pay debts, it is no reply to say that the administrator has sufficient money in hand for that purpose—if this be fictitious money consisting of a debt due from an insolvent executor. It is then regarded as an uncollectible asset: *In re Georgi*, 47 N. Y. Supp. 1061, 21 Misc. Rep. 419. Even in Massachusetts, where the doctrine is more strictly adhered to, and where it is held that the sureties are bound for the debt of an insolvent administrator (*Stevens v. Gaylord*, 11 Mass. 269; *Winship v. Bass*, 12 Mass. 198), it was nevertheless held that if the debt is secured by a second mortgage the estate could redeem from a sale made under the first: *Kinney v. Ensign*, 18 Pick. 232. Of course, if the money had been paid the lien was discharged and the estate had no right to redeem, but Judge Shaw said: "The taking of administration by a debtor is not, in fact or in law, to all purposes payment of the debt; as between the administrator himself and those beneficially interested in the estate, he is held to account for it as a debt paid, from convenience and necessity—because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself. But this is in the nature of an estoppel; and it is a well-settled rule that, although a party is bound by an estoppel as of a fact proved or admitted, yet it shall not be taken as a substantial fact, from which other facts can be inferred, . . . but such a legal fiction will never be allowed to work wrong and injustice." So

the estate was allowed to redeem, which it would have had neither the occasion nor the right to do if it already had the money due from its debtor.

The force of the last case may be somewhat weakened by the subsequent case of *Tarbell v. Jewett*, 129 Mass. 457. No question is raised in that case, however, as to the effect the insolvency of the administrator might have upon the question. I am not disposed to deny that, so far as the administrator has the ²⁴⁶ means to pay, he and his sureties may be charged with the money as in the hands of the administrator.

In the case of *Baucus v. Stover*, 89 N. Y. 1, while the court strenuously insists that the debt must be deemed collected, it nevertheless holds that it will not for all purposes stand on the same footing as money collected. He, the administrator, cannot be committed for a contempt for not paying it over in pursuance of a final decree. Here it is interesting to ask why. It has been solemnly adjudged that he actually has the money in hand, and, of course, that being so, he can and should pay it over. Is not the mistake in allowing a decree so absolute to be entered?

In fact, it was also said that it would be well for the surrogate in the decree charging the executor with the debt as so much money "to specify the charge thus made separately, so as to save all the rights of the executor and to protect him against consequences which ought not to follow from such a charge." Whether the sureties would be bound for the debt under such a decree the court expressly declined to decide.

This was the case of an executor, and the state of New York has a statute from which section 1447 of our Code of Civil Procedure was taken. The two provisions are practically identical. The court was applying the language of the statute to the case and felt bound by its absolute terms.

The appeal was from a decision of the general term, reported in 24 Hun, 109. The lower court was reversed, but the appellate tribunal seems to have been impressed with the views of the lower court, and apparently attempted to avoid some inconveniences pointed out in an able opinion rendered by Judge Bockes. Judge Bockes thought, while the executor might be held liable to the estate, he should not be made subject to be imprisoned for debt, as he would be if charged by such a decree. Nor should his sureties be made to pay his individual debt if it has not been lost by his failure to do his duty as executor. The court of appeals met these objections by suggesting to the

probate court to show by its decree how much was real money in the hands of the executor and how much was constructive money. The constructive money may be a just liability against the executor, but the fiction becomes an unjust reality when ²⁴⁷ the charge is entered, without qualification, in the final decree.

The sequel to the case of *Baucus v. Stover*, 89 N. Y. 1, was a suit on the bond against the executor and his sureties. The appeal to the supreme court is reported in 45 Hun, 582. It was held that the decree was not conclusive against the sureties nor against the executor in a contempt proceeding. This, as the court determined, was in accordance with the ruling in *Baucus v. Stover*, 89 N. Y. 1, and of the following cases from other states: *Harker v. Irick*, 10 N. J. Eq. 269; *Ordinary v. Kershaw*, 14 N. J. Eq. 528; *McCarty v. Frazer*, 62 Mo. 263; *Garber v. Commonwealth*, 7 Pa. St. 265; *Piper's Estate*, 15 Pa. St. 533.

The court said that the sureties did not agree to augment the estate, but that the executor would not waste it or be in default, that the executor was not in default, and there was no deficiency to make good. He had all that had come to his hands and all that by the greatest diligence he could get. All this he was ready to distribute; more he could not do, unless he could make something out of nothing. This judgment was affirmed: *Baucus v. Barr*, 107 N. Y. 624.

Sureties are usually entitled to be subrogated to the securities held by the creditor. Here they would succeed to the debt against the administrator. They are simply compelled to purchase a worthless debt which they did not guarantee. Is it possible that this legal fiction can work such a result? The estate has lost nothing by the administration. By the procedure recommended in *Baucus v. Stover*, 89 N. Y. 1, as to the form of the decree settling the final account, the estate would still retain the personal demand against the administrator, changed to a judgment. And there being no official delinquency, except that created by the fiction, which must stop where equity fails to go with it, there can be no reason for holding the sureties. They are considered as estopped by the decree founded, not on a fact, but on the fiction. The administrator, so far as the decree can subject him to imprisonment for failing to pay over the money, has equal reason to complain of its form.

The same conclusion was reached in a different way by the supreme court of Vermont in *Lyon v. Osgood*, 58 Vt. 707. It

was a suit in equity by a surety to reform the decree because it charged the executor with his entire personal debt, whereas ²⁴⁸ it was alleged he had the means to pay only a part of it. The relief was granted, the court saying that the executor should not be charged for his personal debt beyond his actual ability to pay, "for only to that extent does he by his appointment receive money from himself belonging to the estate." And again the authorities are cited. They need not be repeated here. Unquestionably, there is a conflict, but Woerner, in 2 American Law of Administration, 1140, states that sureties are held not bound when the administrator is utterly insolvent in Indiana, Maine, Wisconsin, New Jersey, New York, Oregon, Pennsylvania, Tennessee, and Vermont.

If this view is to prevail, there may arise a question as to the proper form of entering the decree settling the final account. It seems to me the mode suggested in *Baucus v. Stover*, 89 N. Y. 1, 45 Hun, 582, is a proper method, and that the decree involved here should be so modified. The administrator should be charged with the entire sum, including the debt due from himself, and the decree should then show what portion of that amount consisted of debts due from the administrator which he reported as cash on hand. Of course, if it appears that he actually has the money, this formula would be unnecessary.

But under such a decree the administrator might be able to purge himself of contempt, and the sureties, if it should be held to be a defense—for that is not involved here—could show that some portion of it the administrator never had the means to pay. And the heirs could still proceed against the administrator and collect the amount from him if he acquired the means.

The case of *Treweek v. Howard*, 105 Cal. 434, is much relied upon by respondent. That was against the sureties of an executor. That decision was based upon the estoppel of the decree and upon section 1447 of the Code of Civil Procedure, which was construed to mean that the liability of the executor for such debt was in all respects the same as for money in his hands.

That decision may be justified by the estoppel of the decree. The question is not so presented here. So far as it is based upon the statute, it is apparently in conflict with the cases in New York construing the statute from which our code provisions are ²⁴⁹ taken. This is, however, not the case of an executor. The code lays down no such rule in regard to administrators. They are still left under the common-law rule, under which, as

we have seen, the debt due the estate from an insolvent administrator is not for all purposes regarded as money on hand, but is so regarded only by a fiction of law which can only subsist with justice.

I do not see under this view that the appellant was injured by the ruling rejecting the offered evidence. The court should, perhaps, have permitted the evidence to be given, but the only relief it could have entitled him to receive is warranted by the evidence put in by the contestant. The decree settling the annual account, including the findings, show that the administrator was charged, not for money actually received, but for a debt due from him to the estate. In *Miller v. Lux*, 100 Cal. 609, it was held that the decree is in reality a judgment and the findings are a part of the judgment-roll. The findings in the matter of the first contest contain a full statement of the facts.

The case is remanded, with directions to modify the decree so that it will appear upon the face thereof that a certain portion of the money in the hands of the administrator, to be stated therein, is for a personal debt due from the administrator to the estate of the decedent.

McFarland, J., and Henshaw, J., concurred.

EXECUTORS AND ADMINISTRATORS—SURETIES' LIABILITY FOR ADMINISTRATOR'S PERSONAL DEBT.—If the assets of a decedent's estate consist, in whole or in part, of a debt due the estate from the administrator, the law presumes, according to some of the cases, that it has been paid, and therefore received by the administrator. Consequently, his sureties are held accountable for it, whether the principal is able to pay or not. Other authorities, however, say that the liability extends only to cases where the administrator is able to pay the debt: *Note to Commonwealth v. Stub*, 51 Am. Dec. 521. Compare *note to Griffith v. Chew*, 11 Am. Dec. 567.

EXECUTORS AND ADMINISTRATORS—INDIVIDUAL LIABILITY.—In an action against an executor in his representative capacity, it is not competent to establish and adjudge an individual liability against him: *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308.

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SELNA v. SELNA.

[125 CALIFORNIA, 357.]

VENDOR AND PURCHASER—VENDOR'S LIEN—WAIVER OF, BY FILING CLAIM AGAINST ESTATE.—Under a statute which gives a vendor's lien to one who sells real property, independently of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, a vendor, holding a deceased purchaser's note for the balance of the purchase price of land, does not waive his lien by having his claim filed and allowed against the purchaser's estate.

VENDOR AND PURCHASER—VENDOR'S LIEN—WAIVER OF—BURDEN OF PROOF.—In an action to establish a vendor's lien, the burden of proof is upon the purchaser to show that the lien has been displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches.

VENDOR AND PURCHASER—VENDOR'S LIEN—WAIVER OF—PRESUMPTION.—So long as the debt for the purchase price of land exists, courts will not presume that the lien has been waived, except upon clear and convincing testimony.

Action to enforce a vendor's lien, brought by the appellant, Leopold Selna, individually, and as administrator, against Pearl E. Selna, and others.

Louttit & Middlecoff, for the appellant.

Budd & Thompson, for the respondents.

358 COOPER, C. Action to recover four hundred and twenty dollars and have same declared a lien upon certain real estate. Judgment for defendants. Appeal from the judgment on the judgment-roll. It appears from the findings that on August 30, **359** 1894, the plaintiff sold and conveyed by deed of grant the premises described in the complaint to one Patrick Selna, for the sum of fifteen hundred dollars, all of which amount had been paid prior to August 2, 1897, except the sum of five hundred dollars, and on said last-named date said Patrick Selna executed and delivered to plaintiff his promissory note for said balance of five hundred dollars. On this note there was paid on the twenty-seventh day of December, 1897, the sum of eighty dollars. On January 15, 1898, the said Patrick Selna died intestate, being at the time of his death the owner of the said real estate, leaving a balance of four hundred and twenty dollars due and owing to plaintiff on said promissory note, and leaving surviving him his wife, Pearl E. Selna, one of the defendants herein. February 4, 1898, the plaintiff was duly appointed administrator of the estate of said Patrick Selna, deceased, quali-

fied, and letters of administration were issued to him. February 19, 1898, the plaintiff, as such administrator, published a notice to creditors, as required by statute, and on the fifteenth day of April, 1898, prepared his claim against said estate for the balance of four hundred and twenty dollars so due upon said note. The claim contained a copy of the said promissory note, but made no reference to any claim of lien, and was properly verified as required by statute. The claim as so presented was allowed and approved April 15, 1898, by the judge of the superior court in which the estate was pending, and was on said last-named date filed with the clerk of said court. July 15, 1898, the said superior court, by decree duly made and entered, set apart the said premises to defendant, Pearl E. Selna, as a homestead. The complaint was filed August 3, 1898, all recourse against any other property of the estate is expressly waived, and it is sought to have it adjudged that the four hundred and twenty dollars balance of the purchase price of said premises is a lien thereon, and that the premises be sold to satisfy said lien. The learned judge of the court below found all the facts as herein stated, but, as a conclusion of law, found that the plaintiff, by so having the said claim allowed and filed, waived all right to have the same declared to be secured by a vendor's lien. The sole and only question to be determined upon this appeal is whether or not the plaintiff, by so having his claim allowed and filed, ³⁶⁰ waived his right to a vendor's lien upon the property described in the complaint. There is no proof or finding of any act or word of plaintiff tending to show an intention to waive the lien except the act of having his claim so allowed and filed. As to vendors' liens, the provisions of our Civil Code are as follows:

"Sec. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

"Sec. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien."

"Sec. 3048. The liens defined in sections 3046 and 3050 are valid against everyone claiming under the debtor, except a purchaser or encumbrancer in good faith and for value."

It is evident that the statute gives to the seller of real estate a lien for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. The court in this case found that the four hundred and twenty dollars, part of the purchase price, remains unpaid and unsecured except by the note and the filing thereof as a claim. The rule of our Civil Code was intended to make more clear and definite the equity rule as to vendors' liens.

The principle upon which this lien has been established by courts of equity is that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money. The true origin of the doctrine may with high probability be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England: 2 Sugden on Vendors, 324, and note 2. Judge Redfield, in the case of Manly v. Slason, 21 Vt. 275, 52 Am. Dec. 60, said: "There can be no doubt that the existence of such a lien is among the settled doctrines of the English chancery. . . . Its foundation exists in the general principles of equity, and moral justice, by which the seller is entitled to hold upon the estate until he gets the price."

361 The lien of the vendor is of so high a nature that it is not extinguished by his death, but passes to his representatives. Nor is it discharged by death of the grantee, but may be enforced against his estate or those into whose hands the property may come: 2 Warvelle on Vendors, 700, 701.

The question as to what constitutes a waiver of this lien of the vendor has been a source of much controversy. The authorities generally agree that to constitute a waiver of the lien there must be some act or omission by the vendor showing an intention on his part to waive the lien. The rule is thus stated in Overton on the Law of Liens: "Sec. 622. To constitute a waiver of the right to the lien there must be some act or omission by the vendor which actually or impliedly evinces an intention on his part to dispense with the security given him in equity. Therefore, in any question of this character the point to determine will be, Has the vendor, by such or such an act or omission, so placed his rights in relation to the lands sold or to the vendee that it would be inequitable to sustain this right in his favor? Or has his act been such that it shows a determination not to rely upon his lien?"

And to the same effect are the following authorities: 2 Jones on Liens, sec. 1073; 2 Warvelle on Vendors, 712; note to Mack-

reth v. Symmons, 1 White & Tudor's Lead. Cas. Eq., pt. 1, pp. 482-484. Applying the rule thus laid down, was the act of plaintiff in filing his claim such an act as would make it inequitable to allow him to sustain his lien, or such that it showed a determination on his part not to rely upon it? We think that the mere fact of making out and filing the claim did not show any determination or intention of plaintiff not to rely upon his lien; neither do we think such fact in any way would make it inequitable to now allow such lien. No one has been injured by any delay, act, or conduct of plaintiff. The filing of the claim did not deceive anyone, and the right of plaintiff to a lien is such that we cannot presume from any trivial circumstance that such right was waived. The plaintiff could not have maintained any action upon the note without first presenting his claim: Code Civ. Proc., secs. 1500, 1510. The claim was not secured by any mortgage or recorded lien, and, therefore, it was not necessary for it to contain any statement as to the claim of ³⁶² lien: Code Civ. Proc., sec. 1497. It might have stated the claim of lien and that the claimant did not intend to waive it, and it would, perhaps, have been the better practice if it had so stated, but as the statute does not expressly require such statement, we think it would be a harsh rule to hold that the absence thereof of itself waived the lien.

The burden of proof is upon the purchaser to establish that in the particular case the lien has been intentionally displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches: 2 Story's Equity Jurisprudence, sec. 1224; Wilson v. Lyon, 51 Ill. 166; Truebody v. Jacobson, 2 Cal. 286; 2 Warvelle on Vendors, 713. And, so long as the debt exists, courts will not presume that the lien has been waived, except upon clear and convincing testimony: 2 Warvelle on Vendors, 712-714; Cole v. Withers, 33 Gratt. 195.

Defendant in support of her claim that the lien was waived relies upon Fitzell v. Leaky, 72 Cal. 484, Avery v. Clark, 87 Cal. 623, 22 Am. St. Rep. 272, and Holt Mfg. Co. v. Ewing, 109 Cal. 355. In Fitzell v. Leaky, 72 Cal. 484, the action was brought to enjoin the defendant, as sheriff, from selling one-fourth of a water ditch claimed by plaintiff to be appurtenant to and a part of his homestead. The question discussed was whether or not the interest in the water ditch was a part of the homestead. There was no issue or determination of any issue as to a vendor's lien, but the court in the opinion used this language: "If Kelly ever had the right to have a vendor's lien adjudicated and

declared by a court of equity, he has never commenced proceedings to that end, but has waived his lien by taking a general judgment, which, if docketed, was a lien on all the real property of the plaintiff." This remark by the learned judge who wrote the opinion was obiter dictum, but if it stated the law correctly it has no application to the facts of this case. Here plaintiff had no judgment docketed nor any judgment which was a lien upon any property. His allowed claim was in certain respects in the nature of a judgment, but only a qualified judgment. It was not a lien upon any real or personal estate. It was not conclusive upon the heirs of the estate: Code Civ. Proc., sec. 1636; *Weihe v. Statham*, 67 Cal. 84; *Estate of Hill*, 62 Cal. 186. Before the death of Patrick Selna plaintiff ³⁶³ had the right to look not only to the land, but to the property owned by him in determining whether or not the note could be collected. After his death and the allowance of the claim he had a right to look to the same property, diminished by the right given the administrator to take a certain portion of it for expenses of administration, for the payment of preferred claims and such family allowance as the court might make for the support of the family of deceased. The filing of the claim did not give plaintiff any security upon any specific property nor any lien upon any property. It is stated by the authorities that if the vendor recover a judgment at law and has not exhausted his remedy by execution, he is not precluded thereby from proceeding to enforce his equitable lien for the purchase money: *Walker v. Sedgwick*, 8 Cal. 404; *Overton on the Law of Liens*, 691; *McAlpin v. Burnett*, 19 Tex. 497; *Dubois v. Hull*, 43 Barb. 26; 2 *Warvelle on Vendors*, 719; *Palmer v. Harris*, 100 Ill. 276; *Chapman v. Lee*, 64 Ala. 483.

In *Avery v. Clark*, 87 Cal. 623, 22 Am. St. Rep. 272, it appeared that one Robbins, the grantor, conveyed to Mrs. Hume-ton a tract of land and took as part payment the promissory notes of herself and husband, secured by their mortgage upon the land conveyed. It was held that the unpaid price of the land did not thereafter "remain unsecured otherwise than by the personal obligation of the buyer."

The case of *Holt Mfg. Co. v. Ewing*, 109 Cal. 355, was replevin for a harvester sold and delivered to one Ewing in his lifetime. Under the contract of sale, the title to the harvester was to be and remain in plaintiff until the full payment of the price had been made. Certainly, promissory notes had been given to plaintiff by said Ewing, and upon the last one there

remained a small balance due when the maker thereof died. The plaintiff duly made out and presented its claim against the estate of said Ewing for the balance due upon this note. The claim was allowed and placed on file. This court held that the sale was a conditional one, and that upon the default of the purchaser the plaintiff had either of two remedies. He could retake the property or recover it by action, or he could regard the sale as an absolute one and recover upon the notes, but that the two remedies being inconsistent he could not pursue both. The principle ³⁶⁴ upon which the case was decided has no application to the present case.

We advise that the judgment be reversed and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of plaintiff and in accordance with the views herein expressed.

Gray, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of plaintiff and in accordance with the views herein expressed.

Garoutte, J., Van Dyke, J., Harrison, J.

VENDOR'S LIEN—WAIVER OF, BY TAKING NOTE OR FILING CLAIM AGAINST ESTATE.—A vendor of land does not lose or waive his lien thereon by taking notes from his vendee for the unpaid purchase money: Note to Maroney v. Boyle, 38 Am. St. Rep. 825. Nor does the judgment of a county court allowing and ordering the payment of a claim against an estate discharge a vendor's lien thereon: Hays v. Horine, 12 Iowa, 61, 79 Am. Dec. 518.

VENDOR'S LIEN—WAIVER OF.—THE BURDEN of showing the waiver of a vendor's lien is on the purchaser: Note to Dowdy v. Blake, 7 Am. St. Rep. 95.

BURK v. ARCATA AND MAD RIVER RAILROAD CO.

[125 CALIFORNIA, 364.]

DAMAGES—NEGLIGENCE CAUSING DEATH—EVIDENCE—COLLATERAL HEIRS—PROBABLE LOSS.—In an action to recover damages for a death caused by the defendant's negligence, brought by a sister and brothers of the deceased, all the parties being adults, the plaintiffs cannot recover more than nominal damages without proof of probable loss. The mere fact that the plaintiffs are collateral heirs of the deceased is not evidence of probable loss, and, where there is no evidence of pecuniary damage, nominal damages only can be recovered.

DAMAGES—NEGLIGENCE CAUSING DEATH—EVIDENCE—POSSIBILITY OF FUTURE BENEFITS—CONJECTURES—SPECULATIONS.—In an action to recover damages for a death caused by the defendant's negligence, brought by a sister and brother of the deceased, all the parties being adults, the law simply measures the injury complained of by the loss it has caused, or will cause, in dollars and cents, and, where there is no proof of actual injury, the jury, in estimating the damages, are not at liberty to consider the mere possibility of future benefits to the complaining parties, but must be guided solely by the evidence introduced, and not indulge in conjectures or speculations not supported by the evidence.

Chamberlain & Wheeler, Buck & Cutler, and S. M. Buck, for the appellant.

Frank McGowan, Brousse Brizzard, and Mahan & Mahan, for the respondents.

365 **TEMPLE, J.** This is an appeal from a judgment and from an order refusing a new trial. The suit was brought by a sister and two brothers of George W. Burk to recover damages for his death, which was caused by the negligence of the defendant. The plaintiffs are all adults, and the deceased at the time of his death was thirty-four years old. It was admitted that he was in good health, a competent and reliable locomotive engineer, in the receipt of monthly wages in the sum of seventy-five dollars, and was well inured to his work. He had never been married and was boarding with one of his brothers immediately before the accident, and was on friendly terms with plaintiffs.

Plaintiffs recovered judgment for fifteen hundred dollars. The defendant contends that there was no evidence which tended to show any damage whatever, and therefore plaintiffs were entitled to nominal damages only. An instruction to that effect was asked and refused. This presents the only question on the motion for a new trial or on the appeal.

The instructions actually given to the jury by the court on the subject of damages are not complained of. Instruction 27 contains a full and correct statement of the general rule. It is as follows: "I charge you that damages can only be given for the actual pecuniary injury or loss suffered by the parties complaining; in other words, in a case such as the present, should you find that plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the plaintiffs have sustained, or will sustain, by the death of said George W. Burk. And in this regard I charge you that no damages can be given to plaintiffs for the grief or sorrow or pain of mind,

or injury to their feelings, or for loss of society of deceased, or for his pain or suffering, or for the loss of his comfort or protection. The law simply measures the injury complained of by the loss it has caused or will cause in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence; but you must determine this question solely by the evidence introduced ³⁶⁶ before you. If you are not able to determine from the evidence that the plaintiffs have suffered a pecuniary injury or loss in the death of George W. Burk, it becomes your duty to return a verdict for defendant. And in passing upon the extent of the pecuniary injury or loss sustained by the plaintiffs, you must be governed solely by the evidence introduced; you must not indulge in conjectures, or speculations not supported by the evidence."

The defendant requested an instruction as follows, which was refused: "There is no evidence in the case tending to prove whether George W. Burk was in the habit of saving his wages, or whether he was in the habit of spending all his earnings, or whether he ever contributed toward the support of or to the plaintiffs, or either of them, or whether plaintiffs ever had any reasonable expectation of receiving aid from him. Therefore, if you find a verdict in favor of the plaintiffs, you must limit the amount of damages to a merely nominal sum."

The condition of the evidence was undoubtedly as recited in the proposed instruction, there being no evidence whatever upon the subject except as I have stated.

Respondent contends for the rule laid down in *Illinois Cent. R. R. Co. v. Barron*, 5 Wall. 106, where it was said that the relatives for whose benefit the suit was brought need not have had a legal claim upon the deceased, and that they can recover what it is reasonably probable they would have received from the deceased had he not been killed. But this, if admitted, still leaves the question unanswered. Does the evidence show that it was reasonably probable that they would have received anything from deceased if he had not been killed?

Ordinarily, it would be admitted these mere possibilities of benefits—for they are really nothing more than that—would not be a proper basis for the estimate of damages. It is recognized that there may be no evidence of actual damage and that the loss is problematical. It is contended that the legislature intended that some damage should be allowed, and in some states it is left to the jury to estimate the pecuniary value of the life upon vague surmise of possible advantage.

The statutes in the different states, though varying greatly, follow generally Lord Campbell's act, 9 & 10 Victoria, chapter 95. In ³⁶⁷ that it was recited that no right of action existed at common law for such damages. It was then a new right of action. It could not be a continuation of the right which the injured man had for the injury, for the loss to his heirs did not accrue until he died. Under our statute, the injured person might survive long enough to sue and recover damages or to settle with the wrongdoer, and then by his death a new cause of action would accrue to his heirs. True, it has been held differently in some states, which have what are called survival statutes. Here it has been ruled, as the fact evidently is, that the statutes create an entirely new cause of action: *Munro v. Pacific etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248. And the jury were instructed in this case that damages can only be given "for the actual pecuniary injury or loss suffered by the parties complaining."

It has been said that Lord Campbell's act was intended to be penal. It had been found that persons causing death by negligence could not be convicted of manslaughter, and it was thought that in the interests of the public some punishment should be meted out to them. Had it been expressly made punitive, much trouble would have been avoided. The English courts held that only pecuniary loss could be recovered, and that a plaintiff must show actual loss or he has no cause of action. In this country, the ruling is nearly unanimous that the statute gives a cause of action, and, if no damages are proven, nominal damages only can be recovered.

Unless the mere fact that plaintiffs were at the time of his death the heirs of deceased tends to show pecuniary damage, they have shown none.

In *Illinois Cent. R. R. Co. v. Barron*, 5 Wall. 106, it is said that it is presumed that the property of the deceased would have gone at his death as directed by law, and if he had survived he would have added something to his estate which his next of kin would have inherited, and the equivalent as estimated by the jury may be given his representative. This ruling has been followed often in the federal courts and by many state courts. The decision is criticised in *Baltimore etc. R. R. Co. v. Galway*, 6 App. Cas. (D. C.) 143. It is shown to be opposed to reason and the trend of the decisions and a misconception of the Illinois statute as afterward construed in *Chicago etc. R. R. Co. v. Swett*, ³⁶⁸ 45 Ill. 197, 92 Am. Dec. 206, by the supreme court of Illinois.

In these cases the jury have been permitted to indulge in mere conjecture, that they may find some damage under the statute. It is said the fact that a right to sue is given implies that damages may be recovered, although no rights of plaintiffs have been violated. Confessedly, plaintiffs had no legal claim on deceased for anything, and he owed no duty to them to accumulate an estate and leave it to them. Let us consider upon what a sea of uncertainty the jury must embark: 1. Would the deceased have had the health to work and accumulate, and would he have done so? He never had saved anything, and it does not appear that he could have done so. 2. Might he not have married and have had children of his own who would inherit? 3. Might he not by will have disinherited the plaintiffs? And 4. Might he not have outlived them?

The majority of men die without much property. Whether the deceased would have succeeded in accumulating, and, if he had been successful, would have left it to plaintiffs, is matter of pure speculation. Such a guess as to probabilities is not, according to settled rules and maxims of the law, proper ground for the award of damages. I see no reason why this class of cases should constitute an exception. If it was intended to punish for wrongdoing, the law could be understood. But the courts hold, and it is made the law of this case by the instructions, which were not excepted to, that plaintiffs can recover only the number of dollars they have lost by the death of George W. Burk. Unless they lost a probable increase to their inheritance from their brother, I see no evidence which tends to prove that they lost anything.

This question was not at issue and was not discussed in *Harrison v. Sutter Street R. R. Co.*, 116 Cal. 156. The rule was conceded.

The suit could have been maintained by the administrator for the benefit of the estate. The heirs would not take the money as heirs—that is, they would not take by succession, but as the beneficiaries of the statute. The deceased was not entitled to the damages, nor was the right of action in him. The loss, for which recovery may be had, is the loss to survivors by his death. This would have been the same had he died from natural causes. ³⁰⁰ Since punitive damages cannot be recovered, the wrongfulness of that act cuts no figure further than to bring the case within the statute. The act causing the death must be willful or negligent. There is no reason why, in the estimate of damages, the ordinary rules of law should be departed from. The

intention is always to give such damages as, under the circumstances of the case, are just. These words in the statute cannot change the rule, unless they are interpreted to mean that the discretion of the jury shall be uncontrolled. It has not been so decided.

The statutes upon this subject seem to be framed upon the idea that the heirs will always constitute the family of the deceased. In some states the beneficiaries of this statute are so limited. We can easily understand that a life may be of great pecuniary value to such persons. Collateral heirs, at all events, must prove probable loss or their recovery will be limited to nominal damages.

The judgment and order are reversed and the cause remanded.

Garoutte, J., and McFarland, J., concurred.

Hearing in Bank denied.

DAMAGES — NEGLIGENCE CAUSING DEATH — EVIDENCE — PECUNIARY LOSS.—A right of action for negligence which causes the death of a human being is purely statutory, and such an action can be maintained only by the persons named in the statute as beneficiaries. A plaintiff must, as a condition precedent, bring himself within the statute under which he sues: See monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 669, 678, on actions for the death of a human being. Furthermore, unless there has been pecuniary loss sustained by the plaintiff, no matter how near his relationship to the person killed may be, he can recover nominal damages only; but where such loss is shown, compensation must be given, no matter how remote the degree of relationship may be. But the jury, in awarding damages, must not guess at them. They must use a reasonable discretion in estimating them; and damages out of reasonable proportion to the expectations of pecuniary profit to be justly anticipated from the deceased cannot be awarded: See monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375, 379, on the elements and measure of damages in actions for having caused the death of human beings.

ESTATE OF PACKER.

[125 CALIFORNIA, 396.]

EXECUTORS AND ADMINISTRATORS — LEGISLATIVE POWER TO AUTHORIZE SALE OF REAL ESTATE FOR BENEFIT OF HEIRS.—Upon the death of an ancestor, his heirs immediately have a vested right in his real property, subject only to liens or burdens then existing or created by law in force at the time; and, after the title has thus vested in the heirs, the legislature has no power to divest it by authorizing the administrator to sell the inheritance for the benefit of the heirs.

James Burdett, for the appellant.

Charles L. Batcheller, for the respondent.

³⁹⁶ CHIPMAN, C. Pending administration of the above-entitled estate the administrator filed his petition praying for an order to sell certain real property belonging to the estate, "on the ground that it was for the advantage, benefit, and best interests of the estate and those interested therein," setting forth in detail "in what way an advantage and benefit would accrue to the estate, and those interested therein, by such sale." An order was duly made reciting the substance of the petition and fixing a time and place for its hearing. This order was duly published as required by law. Upon the hearing, proofs in support of the petition were submitted, and no one interested in ³⁹⁷ the estate opposed the application. The sale was ordered and made in due course, and was duly confirmed after hearing of returns of account of sale and upon due notice. The surviving wife of deceased, one of the heirs at law, appeals.

The petition showed that there were no debts, expenses, or charges of administration to be met and that the only ground for the order was as above stated. Section 1537 of the Code of Civil Procedure, as amended in 1893, reads: "And if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate and those interested therein that a sale be made, the petition . . . must set forth in what way an advantage or benefit would accrue to the estate, and those interested, by such sale," etc. Section 1538 of the Code of Civil Procedure provides as follows: "If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit, and best interests of the estate and those interested therein, to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section, or any of them,

such petition must be filed, and an order thereupon made" directing all persons interested to appear and show cause, etc., at a time and place specified. Section 1542 of the Code of Civil Procedure authorizes the court to order the sale if the allegations of the petition are sustained by the proofs. Sections 1543 and 1544 relate to the same matters.

Appellant relies upon the case of *Brenham v. Story*, 39 Cal. 179; citing, also, *Pryor v. Downey*, 50 Cal. 409, 19 Am. Rep. 656; *McNeil v. Congregational Soc.*, 66 Cal. 110; *Smith v. Olmstead*, 88 Cal. 582, 22 Am. St. Rep. 336; *Bates v. Howard*, 105 Cal. 173; and some other cases; also, 2 *Woerner's American Law of Administration*, secs. 469, 470.

In *Brenham v. Story*, 39 Cal. 179, an act of the legislature approved April 15, 1861 (Stats. 1861, p. 152), authorized the administrator of Charles White, deceased, "to sell at public or private sale, at his discretion, and without having first obtained an order of the probate court therefor, the whole or any portion of the real estate, or any right, title, or interest therein, claimed, held, or owned by the said Charles White, at the time of his death, as in the judgment of such administrator will best promote ³⁹⁸ the interests of those entitled to said estate." This act was amendatory of section 1 of an act approved April 6, 1860: Stats. 1860, p. 148. Other sections of the act of 1860 required the administrator to report the sale to the court for approval and empowered the court to act *ex parte* on the report, and made no provision for notice of any hearing on the report. Upon such approval of the court the administrator was authorized to make a deed. This was a special act passed after the death of the intestate. The general law then was much the same as now, and authorized the sale of real estate for the purpose of making payment of family allowance, debts of the decedent, or the debts, expenses, or charges of administration or legacies, but the general law did not then provide for a sale of real estate, there being no such charges, whenever, in the judgment of the administrator, the sale would best promote the interest of those entitled to the estate. This latter, however, was what the legislature undertook to do by special act, after the death of the ancestor. The court said: "Upon the death of the ancestor the heir becomes vested at once with the full property, subject to the liens we have mentioned (the debts, etc.); and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself

of the relative advantages of selling or holding that any other owner has. His estate is indefeasible, except in satisfaction of these prior liens, and the legislature has no more right to order a sale of his vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way." Respondent misconceives the controlling principle of the case in placing it on the fact "that in passing the act the legislature usurped judicial functions." The decision rests upon the want of power to order the sale after the title had vested in the heirs except for the purposes provided by the law in force at the death of the ancestor. In the case before us, decedent died July 10, 1891, while a resident of this state, and letters were duly issued to respondent as administrator in May, 1892. The act under which the sale was ordered and made was approved ³⁹⁹ March 23, 1893: Stats. 1893, p. 212. Whether the law is constitutional, as applied to the property of decedents who have died since the passage of the act, is a question not presented, and need not be considered or decided. But we think the precise question here involved was decided in *Brenham v. Story*, 39 Cal. 179, adversely to respondent's contention, and must rule this case. The principle there laid down, that upon the death of the ancestor the heir at once becomes vested with the full property, subject only to liens then existing, or created by statute then in force, has never been questioned by the court: See *Smith v. Olmstead*, 88 Cal. 582, 22 Am. St. Rep. 336; *Bates v. Howard*, 105 Cal. 173, and many other cases that might be cited. It is true, as we are reminded by respondent, that in the *Brenham* case the court said: "The right of an heir to his inheritance depends upon positive law, and it is not a natural or an absolute right. It is competent for the legislature to change the rule of inheritance, or to restrict the testamentary power. It may provide, as it has done, that the heir or devisee shall take subject to certain burdens, as the payment of the debts," etc. But this is far from saying that the legislature may, as was attempted in that case, after the title had vested in the heir, empower the administrator to sell the inheritance for purposes not authorized at the time the title vested and to which it was not subject when it vested. Respondent cites *Cooley's Constitutional Limitations* and some cases in support of the power. These may be worthy of consideration when a case arises under the statute where the decedent has died since the enactment of

the amendments, but they do not convince us of any unsoundness in the principles stated in *Brenham v. Story*, 39 Cal. 179. The statute authorizing the mortgaging of estates, to which our attention is called, rests upon the principle that the mortgage provides for the payment of liens existing under the law or likely to arise thereunder.

Respondent presents reasons in support of the statute as applicable to estates where the decedent died after the passage of the law, but, as we have said, that question does not necessarily arise here and ought not to be decided until it does arise; any expression of opinion upon it now would be obiter.

We advise that the order be reversed.

⁴⁰⁰ Haynes C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is reversed
Garoutte, J., Van Dyke, J., Harrison, J.

EXECUTORS AND ADMINISTRATORS—SALES UNDER STATUTORY AUTHORITY—VALIDITY OF.—Upon the death of an ancestor, the title to his real property passes at once to his heirs or devisees, subject to the ancestor's debts and the expenses of administration, but with the right of present possession in the administrator: *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; notes to *Shannon v. Dillon*, 48 Am. Dec. 396; *Dorrance v. Raynsford*, 67 Conn. 1, 52 Am. St. Rep. 266; *Powers v. Morrison*, 88 Tex. 133, 53 Am. St. Rep. 738. Generally speaking, statutes which authorize an administrator to sell the realty of a decedent, where there is a necessity for such sale, as for the payment of debts, are valid: *Kibby v. Chitwood*, 4 T. B. Mon. 91, 16 Am. Dec. 143; *Williamson v. Williamson*, 3 Smedes & M. 715, 41 Am. Dec. 636; but statutory authority by which one may be deprived of his estate must be strictly pursued: Note to *Doe v. Henderson*, 48 Am. Dec. 221. A special act authorizing the sale of certain realty of the decedent, so as to hasten its improvement and increase the value of the residue, and providing that the proceeds shall be assets in the administrator's hands, to be disposed of according to law, is valid: *Chandler v. Douglass*, 8 Blackf. 10, 44 Am. Dec. 732. The heirs, however, cannot be disseised of their freehold, except in accordance with law: *Lane v. Dorman*, 3 Scam. 238, 36 Am. Dec. 543; and real estate can be taken from them, after their ancestor's death, only to satisfy some claim existing against him in his lifetime, or some condition arising in the settlement of his estate which makes a sale of the land necessary or advantageous, and then only in the manner pointed out by law: *Dorrance v. Raynsford*, 67 Conn. 1, 52 Am. St. Rep. 266. A special statute authorizing an administrator to sell real property, there being no necessity for such sale, and its only effect being to convert the property into money for the purposes of distribution, is unconstitutional and void. Such a statute deprives the heirs of their property without due process of law: *Johnson v. Brauch*, 9 S. Dak. 116, 62 Am. St. Rep. 857.

ESTATE OF DONNELLY.

[125 CALIFORNIA, 417.]

CIVIL DEATH IMPORTS A DEPRIVATION of all rights whose exercise, or enjoyment, depends upon some provision of positive law.

THE RIGHT OF INHERITANCE is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime.

DESCENT — INHERITANCE — LIFE CONVICT — RIGHT OF.—A sentence of a person to imprisonment in the state prison for life, under a statute which provides that, after such sentence, the convict shall be "deemed civilly dead," extinguishes his civil rights, including the right of inheritance. He cannot, therefore, be a distributee of an estate to which he would otherwise be an heir.

STATUTES—LIMITING PROVISIONS—EFFECT OF, UPON MAIN ACT.—If a statute declares that "a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead," limitations upon such statute, that the convict shall not thereby be rendered incompetent as a witness, and that his person shall still be under the protection of the law, authorize the conclusion that those are the only cases in which it is not to be applied. The convict's civil death, therefore, destroys every civil right not enumerated in such limitations.

Crittenden Thornton and Thornton & Merzbach, for the appellant.

Timothy J. Lyons, for the respondent E. J. Le Breton.

Edward C. Harrison, for the respondent C. H. Athearn.

Alexander D. Keyes, Dunne & McPike, T. J. Crowley, and Humphreys & Morrow, for the other respondents.

418 HARRISON, J. Thomas Donnelly died intestate February 17, 1896, and on December 3, 1897, the superior court made a decree distributing his estate to his widow and the successors in interest of three of his children. The decedent left surviving him another child, James J. Donnelly, who, prior to his father's death, viz., October 5, 1894, was sentenced to imprisonment in the state prison of the state of California for the term of his natural life, and who, at the time of his father's death and at the date of the said decree of distribution, was in confinement therein under such sentence. February 11, 1897, James made an assignment and transfer of his interest in the estate of his father to Charles J. Stilwell, who, by virtue thereof, claimed to have a portion of the estate of the decedent distributed to him. The court denied his claim and distributed

the estate as above stated. From this decree of distribution Stilwell has appealed.

⁴¹⁹ Section 674 of the Penal Code is as follows: "A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead."

Civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law. In Anderson's Law Dictionary civil death is defined to be: "Extinction of civil rights." Bouvier says: "Civil death is the state of a person who, though possessing natural life, has lost all his civil rights and as to them is considered as dead." Abbott defines civil death to be: "The legal privation or extinction of a person's rights and capacities among his fellow members of society." In *Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111, the court said: "If the convict be sentenced for life, he becomes civiliter mortuus, or dead in law, in respect to his estate, as if he was dead in fact."

If James had died a natural death at the time he was sentenced to imprisonment in the state prison for the term of his natural life, the correctness of the decree would be unquestioned, and, for the purpose of any right of inheritance, his civil death must have the same effect. The right of inheritance is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime.

The provisions of sections 675 and 676 of the Penal Code, instead of impairing this construction given to section 674, strengthen it by showing that but for these provisions, in the opinion of the legislature, the civil death of the felon would extend to the cases therein named; and the enumeration of the cases wherein section 674 is inoperative authorizes the conclusion that those are the only cases in which it is not to be applied.

Avery v. Everett, 110 N. Y. 317, 6 Am. St. Rep. 368, cited by the appellant, has no application to the facts of the present case. In that case the testator died in 1869, leaving to his son, Charles, an estate in the lands in question, which the court held to be a vested remainder in fee, limited upon the life of his mother, but subject to be defeated by his dying without children. This remainder was property capable of being transferred by Charles, and vested in him at the death of his father. In 1875 Charles was convicted of murder and sentenced to imprisonment ⁴²⁰ in the state prison for the term of his natural life. The court was not called upon to consider whether his right of inheritance

was destroyed by the sentence, but whether the sentence operated to divest him of the property at that time owned by him, and held that the sentence did not have the effect to divest him of his interest in the land. The same rule exists in this state by virtue of section 677 of the Penal Code, which provides: "No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law."

The decree is affirmed.

Garoutte, J., Van Dyke, J., McFarland, J., Temple, J., and Henshaw, J., concurred.

CIVIL DEATH AND ITS EFFECT.—A convict sentenced for life becomes *civilitur mortuus*, or dead in law, in respect to his estate, as if he was dead in fact. This, however, is statutory in California: See monographic note to *Avery v. Everett*, 6 Am. St. Rep. 381, on civil death, and the extent to which it is recognized in America. In Texas, such a convict is not civilly dead, and no one can recover property as his heir at law while he remains alive: *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784, and note showing that a person civilly dead is not a "decedent" within the purview of the statute, in reference to estates on which letters of administration may be granted. A life sentence of a convict does not, under the statutes of California, interfere with the disposition of his property, or the taking of it to pay his debts: *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99.

LONDON AND SAN FRANCISCO BANK, LIMITED, *v.* PARROTT.

[125 CALIFORNIA, 472.]

GUARANTY AND LETTER OF CREDIT—WHAT IS—LIABILITY WITHOUT NOTICE.—A written instrument, which is addressed to a bank, requesting it to give continued credit to a third person in a specified amount, which guarantees payment of such credit, to the extent specified, in certain proportions named, and which declares that the same shall be a continuing guaranty by each of the subscribers, in such proportions, until the credit given is fully paid, is both a letter of credit and an absolute guaranty, upon which the subscribers are answerable, without notice of the credit given, and without notice of the acceptance of the guaranty.

GUARANTY, ABSOLUTE—GUARANTY OF CREDIT—WHEN BINDING WITHOUT NOTICE.—Under a statute which provides that an absolute guaranty is binding on the guarantor without notice of acceptance, a guaranty of credit requested of a bank for a third person, and which states that the signers "do hereby severally guarantee the said credits," is binding without any notice of acceptance, for it is an absolute guaranty.

STATUTES—GENERAL AND SPECIFIC PROVISIONS—CONSTRUCTION.—It is a cardinal rule of statutory construction that specific provisions upon a particular subject control general provisions for the class to which that subject belongs. Hence, a provision in one part of a code of laws, which refers to contracts in general, that the consent of parties to a contract shall be communicated to each other, does not apply to a contract of absolute guaranty for the debt or default of a third person, where the specific provisions as to guaranty are found in another part of the same code.

GUARANTY—CONTRACT OF—RULE OF CONSTRUCTION.—Although a guarantor is entitled to stand upon the strict terms of his contract, it must be construed by the same rules which are applied in the construction of other written instruments.

GUARANTY—CONTRACT OF—TWO INTERPRETATIONS—CONSTRUCTION.—The language used by a guarantor must receive a fair and reasonable interpretation for the purpose of effecting the objects of the guaranty, but if it is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, he cannot dispute the right of the person to whom it is given to act upon either interpretation.

PAYMENT OF DEBT—TAKING OF NOTE—GUARANTY.—The taking of a promissory note for an existing liability does not constitute a payment of the debt, in the absence of an agreement to that effect, or evidence that such was the intention of the parties. Hence, where a bank, acting under an instrument of continuing guaranty, gives "credit" to a corporation, but takes a note from it for the amount advanced, before the limit of credit is reached, the taking of the note does not discharge the liability of the guarantors, where it was not given or accepted in payment of the sums advanced.

GUARANTY—DISCHARGE OF GUARANTORS BY TAKING NOTE.—The taking of a promissory note from guarantors does not discharge them from their liability upon the guaranty unless the obligation guaranteed is thereby changed. Hence, if a bank, holding a written instrument which guarantees the credit, in any form, of a corporation, takes a promissory note from the corporation, before the limit of credit is reached, for the amount of its overdrafts, which note is payable one day after date, which is not delivered to the bank until after its date, and which is, therefore, payable immediately, and the bank gives the corporation credit on its account for such note simply for the purpose of closing the overdraft account, such note is evidence of the credit existing at the time it is given, but, as it does not give time to the debtor, it does not change the amount or character of the liability of the guarantors, and does not, therefore, discharge them.

ACCOUNTS—BALANCING IS NOT CLOSING.—An account is not closed at each time a footing is made and the balance carried to another column.

GUARANTY—CEASING OF LIABILITY.—If a corporation, having a continued, guaranteed credit with a bank to a certain amount, overdraws its account before the limit of credit is reached, and the bank takes a note from the corporation simply for the purpose of closing the overdraft account, and gives it credit therefor against the overdrafts, a statement in an agreed case, in an action upon the guaranty, that, after the time of such closing and delivery of the note, the company continued to make deposits and to check against the same, but that no "further" credit was asked by or given to, the company, does not mean that no credit was given after that time. The word "further," so used, is equivalent to "additional,"

and the statement simply means that no additional credit was asked or given. The liability of the guarantors did not, therefore, cease at that time.

PAYMENTS—APPLICATION OF—GUARANTY.—A BANK which holds the note of its customer is not required, at its maturity, or thereafter, to apply thereon moneys subsequently deposited by the customer. Hence, where persons guarantee the payment of all advances made by a bank to a corporation up to an amount specified, and the bank, after making advances, but before the limit has been reached, takes a note from the corporation for the purpose of closing up an overdraft account, the fact that the corporation subsequently makes deposits, and checks against them, does not impose any obligation upon the bank to apply the deposits to the payment of the guaranteed debt, where the guaranty is for an indefinite time, and the amount thereof has not been exceeded.

CORPORATIONS—DOUBLE LIABILITY OF SHAREHOLDERS UPON THEIR GUARANTY.—If some of the stockholders of a corporation personally guarantee the payment of advances made by a bank to the corporation, and do not mention their liability as shareholders, they are answerable, both as guarantors and as stockholders, to the amount of the corporate liability. Liability upon the guaranty does not excuse liability, in any amount, as stockholders; and, while they are not answerable for more than the corporate liability in either or both capacities, yet, where the judgment against them is less than the agreed amount of the corporate liability, it is not material in which capacity it was recovered.

LIMITATIONS OF ACTIONS—LIABILITY OF GUARANTORS, AS STOCKHOLDERS, WHEN NOT BARRED.—If some of the stockholders of a corporation personally guarantee the payment of advances made by a bank to the corporation, and, after considerable advances have been made, the corporation gives the bank a note in acknowledgment of its indebtedness at the time, which note is given before the statute of limitations has run against the liability, and, after such note is given, an action is brought on the guaranty within the period prescribed by such statute, the liability of the guarantors, as stockholders, is not barred as the giving of the note prevented the bar of the statute, and preserved the liability until the maturity of the note.

PAYMENTS—APPLICATION OF DEPOSITS BY COURT.—If a corporation receives advances from a bank during the time that it is making deposits and drawing checks against the same, but such deposits have not been applied by the parties, within the time prescribed by statute, a court may, in a controversy over their application, and without disregarding the plea of the statute of limitations, order that such deposits be applied, first, to the interest due at the time of making the several deposits, and next, to the payment of the checks earliest in time, and that the application be made as of the date of the several deposits, irrespective of the time that has elapsed between the earliest items and the commencement of the action.

PAYMENT—APPLICATION OF DEPOSITS BY AGREEMENT.—If a bank, after having made large advances to a corporation, takes a note from its customer, for the purpose of closing an overdraft account, and before the statute of limitations has run against any item of the account, it is competent for the parties at the time the note is given to agree upon the mode and extent to which previous deposits made by the company shall be applied in extinction of its liability for the advances. Hence, the making and acceptance of the note for an amount agreed upon between them

must be regarded as an agreement, or acquiescence, on the part of the company, in their application to the extinction thereby of so much of the liability theretofore incurred as was not included in the note.

PAYMENT—APPLICATION OF DEPOSITS—PRIOR APPROPRIATION TO PAYMENT OF INTEREST ON ADVANCES.—If interest upon overdrafts is, according to the usual course of business, paid by a memorandum check signed by the bank itself, this is equivalent to an additional advance of an amount equal to the interest so paid, and is not an application of deposits made by the customer. Such payment does not, therefore, affect the application of deposits to the payment of unpaid interest on advances.

PAYMENT—APPLICATION OF DEPOSITS—IDENTITY OF DATE AND AMOUNT.—It does not follow, from the fact that the amount of deposits and of checks drawn by the depositor on the same day are identical, that the deposits and checks are parts of the same transaction and independent of the general account between the customer and the bank. Hence, where there is nothing more than identity of date and amount to show that they were independent transactions, the court's application of deposits to earlier items of the general account between the bank and its customer will not be disturbed on appeal.

Robert Y. Hayne, for the appellant.

Page & Eells and Page, McCutchen & Eells, for the respondent.

479 HARRISON, J. The defendants in the above-entitled cause (with others) executed and delivered to the plaintiff, September 30, 1891, the following instrument:

"To the London and San Francisco Bank, Lt'd, San Francisco, California:

"You will please give credit to the Capitol Packing Company for a sum of money in United States gold coin not exceeding the amount of one hundred thousand (\$100,000) dollars; and as said packing company contemplates a course of future dealing with you, you will please continue the said credit, or, if it should be reduced or satisfied by payments made by said packing company, renew the same from time to time for said amount, or any less sum, or otherwise keep the said credit permanently up to the limit as aforesaid, or any less amount.

"And these presents shall be deemed to be, and shall constitute to you, a continuing guaranty by each of us in the several proportions stated below, in reference to, and embracing, the original credit hereby authorized and all future liabilities of said packing company to you under said original credit, and under such successive transactions with you as shall either continue its liability or from time to time renew it; and such guaranty shall remain and be operative until all present or future

credit or credits given by you as aforesaid, not exceeding the said limited amount, shall be fully paid, subject to our legal right to revoke the same in writing at any time as to any transactions occurring after such revocation.

"The subscribers hereto do hereby severally guarantee the said credits to the amount of one hundred thousand (100,000) dollars, in the following proportions, namely: . . . Thomas Cole, for another twenty-five six hundredths (25-600) part thereof; Abby M. Parrott, for another one hundred and sixty-five six-hundredths (165-600) part thereof.

"This guaranty shall bind each subscriber for his said proportion of said total credit (until after such revocation by him), notwithstanding some part of said total credit shall not be hereby guaranteed.

"Dated San Francisco, September 30, 1891."

480 October 5, 1891, the Capitol Packing Company opened an account with the plaintiff, and thereafter, until August 30, 1894, made deposits of moneys for its said account, drew checks against the same, and received advances by way of loans from said bank, which said advances were, by the said packing company's agreement with said bank, to draw interest, payable monthly, at the rate of seven per cent per annum. In July, 1893, the San Francisco Clearing House, of which the plaintiff was a member, promulgated a rule for the government of its members, that they should not allow overdrafts on the part of their customers; and, for the purpose of complying with this rule, the Capitol Packing Company, at the request of the plaintiff, delivered to it on the sixth day of September, its promissory note for the sum of \$73,000, bearing date August 31, 1893, and payable one day after date. At that time the books of the bank showed an indebtedness on the part of the packing company of \$72,899.61. This note was not accepted by the bank as payment, but its amount was placed upon the credit side of the packing company's account, and was so entered for the purpose of closing on its books the overdraft of the packing company, under the aforesaid rule of the clearing house. A balance was struck in the account, and the difference, viz., \$100.39, was carried to the credit column of the account, the account was continued upon the books, and the packing company continued to make deposits and draw checks against the same until August 30, 1894, when it was finally closed. On July 31, 1895, the total amount due to the bank, as shown by the accounts upon its books, was \$78,110, being the aforesaid sum of \$73,000

and interest thereon for one year. An agreed case containing the above facts and others hereinafter named was submitted to the superior court for its determination, the plaintiff claiming therefrom a right of recovery against the defendants, and they claiming to be under no liability by reason thereof. The superior court rendered its judgment in favor of the plaintiff, from which the present appeal has been taken.

1. The instrument of September 30, 1891, is both a letter of credit and a guaranty. The first portion thereof is a written instrument addressed by the appellants to the respondent, ⁴⁸¹ requesting the latter to give credit to the Capitol Packing Company, and thus falls directly within the terms of section 2858 of the Civil Code; and in the subsequent portion thereof they guarantee the said credit to the amount of \$100,000, in certain specific proportions, and declare that the same shall be a continuing guaranty by each of them in these proportions, until the credit that may be given shall be fully paid. Regarded as a letter of credit, the terms of the instrument do not require any notice of the credit thereafter given, nor can the necessity of giving such notice be implied from its terms; and under section 2865 they became liable for such credit without notice to them. Their guaranty of the credits that might be given thereafter contains no limitation, and is unconditional. It is not an offer to guarantee—its language being that they “do hereby severally guarantee the said credits”—but is an absolute guaranty, and, under section 2795 of the Civil Code, became binding upon them without any notice of acceptance. The provisions of section 1565 of the Civil Code, cited by the appellants, requiring the consent of parties to a contract to be “communicated by each to the other,” has no application to a contract by which one person makes an absolute guaranty to another of the debt or default of a third person. It is a cardinal rule of statutory construction that specific provisions upon a particular subject control general provisions for the class to which that subject belongs: Endlich on Interpretation of Statutes, sec. 399. Section 1565 of the Civil Code refers to contracts in general, and is found in title 1 of part 2 of that code, while the sections relating to “guaranty” are contained in title 13 of part 3 of the same code. Section 4481 of the Political Code declares: “If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject matter of such title.”

It is claimed by the appellants that the acceptance by the bank of the promissory note for \$73,000 was such an alteration of the relation between it and the packing company as to discharge the guarantors, and, in support thereof, they invoke the oft-cited rule that a surety or a guarantor is entitled to stand upon the strict terms of his contract. When it is said that a guarantor is entitled to stand upon the strict terms of his guaranty, nothing more is intended than that he is not to be held liable for anything that is not within the express terms of the instrument in which his guaranty is contained; that his liability is not to be extended by implication beyond these limits, or to other subjects than those expressed in the instrument of guaranty. But for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation for the purpose of effecting the objects for which he made the instrument, and the purpose to which it was to be applied. If this language is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, he is not at liberty to say that the person to whom it is given was not justified in acting upon either, or that he should have acted upon one rather than the other: Civ. Code, sec. 1654; *Bell v. Bruen*, 1 How. 169; *Lawrence v. McCalmont*, 2 How. 426; *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545; *Powers v. Clarke*, 127 N. Y. 417; *Pratt v. Matthews*, 24 Hun, 386; *Smith v. Molleson*, 148 N. Y. 241; *Lefargue v. Harrison*, 70 Cal. 380, 59 Am. Rep. 416.

The taking of the note by the bank did not discharge the appellants from their liability upon the guaranty, unless the obligation which they had guaranteed was thereby changed. By the terms of the instrument of guaranty the bank was to give to the packing company "credit" to the amount of \$100,000, and to "continue the said credit," or, if it should be "reduced or satisfied by payments," renew the same, or otherwise keep the said "credit" permanently up to the limit aforesaid, or any less amount; and the signers thereof agreed that the instrument should be a continuing guaranty in reference to and embracing the original credit thereby authorized, "and all future liabilities of said packing company under said original credit," and under

such successive transactions as shall either "continue its liability, or from time to time renew it," until all present or future ⁴⁸³ credit or credits "shall be fully paid." The instrument does not designate the form in which the credit should be given, and its language is broad enough to embrace any form of credit which might be agreed upon between the bank and the packing company; nor is there any language therein which limits the guaranty, or the credit to be given, to the form which might be originally adopted, or to preclude the bank and the packing company from the right to change the form of such credit, or from adopting at the same time different forms of credit without impairing the guaranty. It may be conceded that if, after the bank had given credit to the packing company by way of an open account for its overdrafts, payable on demand, it had accepted a promissory note therefor by which its right to demand immediate payment would be postponed to a future day, the guarantors would have been discharged, since in that case the contract guaranteed by them would have been changed by giving time to the debtor and preventing them from taking up the debt and immediately suing the packing company. It is stated, however, in the agreed case that the note was not taken by the bank as payment, and, therefore, the original credit given to the packing company was not thereby "reduced or satisfied." In the absence of an agreement to that effect, or evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment of the debt: *Dellapiazza v. Foley*, 112 Cal. 380; *Grangers' Bank v. Shuey* (Cal., Dec. 15, 1898), 17 Cal. Dec. 1. In the present case, the note was not delivered to the bank until after its date and was therefore payable immediately, and the bank could at any time bring its action upon the original overdrafts.

The giving of the promissory note was a transaction between the bank and the packing company which at least had the effect to "continue" its liability for the amount of its previous overdrafts, and was within the express terms of the guaranty. It was evidence of the extent of the credit existing at that time, but did not change the amount or character of the liability. If, instead of taking the note, the bank had at that time sued the packing company and obtained judgment against it for the amount of its overdrafts, the guarantors would not have been thereby discharged, and the taking from it of a written agreement ⁴⁸⁴ to pay the amount of the overdraft can have no greater effect in discharging them. There was but one account opened

with the bank by the packing company, and this account was not finally closed until August 30, 1894; and the entry of the amount of the note to the credit of the packing company upon this account was made merely for the purpose of closing the "overdraft" upon its books, but did not change the liability of the packing company, or reduce the amount of the credit which it had received from the bank. An account is not closed at each time a footing is made and the balance carried to another column. In support of these propositions, the following authorities may be consulted: *Bush v. Critchfield*, 5 Ohio, 109; *Wise v. Miller*, 45 Ohio St. 388; *Fifth Nat. Bank v. Woolsey*, 31 N. Y. App. Div. 61; *Norton v. Eastman*, 4 Greenl. 521; *Lennox v. Murphy*, 171 Mass. 370; *London etc. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179.

It is stated in the agreed case, after reciting the making of the aforesaid note and crediting its amount against the overdraft: "After that time, viz., on and after September 6, 1893, the company continued to make deposits and to check against the same, as is shown by the statement hereto annexed, marked 'Exhibit 2.' But after September 6, 1893, no further credit was asked by or given to the packing company. All deposits so made were applied by the bank to the checks drawn after the date last mentioned, until August 30, 1894, when the said account was finally closed." Upon this statement it is contended by the appellants that their liability as guarantors ceased September 6, 1893; that as after that date the bank gave no further credit to the packing company, the liability of the guarantors ceased at that date. We cannot assent to this construction of the above clause. The argument of the appellants is drawn from what we deem a misconstruction of the language used in the agreed case. The statement that after September 6th no further credit was given to the packing company is not equivalent to a statement that credit was not given to it after that date. The word "further," as here employed, is an adjective, used in the sense of "additional," limiting "credit," and is not to be construed as an adverb of time, qualifying the word "given"; and the phrase is to be construed as ⁴⁸⁵ meaning that after that date the bank gave no credit to the packing company beyond, or in addition to, the amount of the note. The sentence itself is introduced by the restrictive connective "but," and its apparent purpose is to limit the statement in the previous sentence that after that date "the company continued to make deposits and to check against the same," by declaring

that, notwithstanding the checks drawn against the deposits, they did not of themselves result in giving any credit to the packing company. This construction is consistent with the fact, appearing upon the face of the account, which is referred to in the sentence, that after that date there were no further overdrafts—the deposits being at all times in excess of the checks—and also harmonizes with the effect which we hold is to be given to the transaction of accepting the note and placing its amount to the credit of the packing company's account.

Permitting the packing company to draw checks against the deposits made by it after September 6, 1893, did not affect the liability of the guarantors. The moneys so deposited were not directed to be applied as payments upon the note, and, in the absence of any direction, the bank was not required to make such application. A bank which holds the note of its customer is not required at its maturity, or thereafter, to apply thereon moneys subsequently deposited by the customer, and an indorser or surety upon the note is not discharged by its omission to make such application: *Morse on Banks and Banking*, sec. 562; *First Nat. Bank v. Peltz*, 176 Pa. St. 513, 53 Am. St. Rep. 686; *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368; *Strong v. Foster*, 17 Com. B. 201. And if the bank was not required to make such application, its payment of checks drawn subsequent to the deposits was not a reloading to the packing company of money that should have been applied toward the payment of the note. As we hold that the "credit" which was guaranteed did not cease on the 6th of September, but continued from the time it was opened with the bank in October, 1891, it is immaterial, so far as the guarantors are concerned, whether the deposits made after that date were applied in reduction of the amount of the note, or in payment of checks subsequently drawn. The liability of the packing company ⁴⁸⁶ which they guaranteed was whatever amount of credit less than \$100,000 might at any time exist in favor of the bank, whether in the form of an open account for overdrafts, or in the nature of bills receivable. As between the bank and the packing company, all the payments of its checks by the bank upon overdrafts constituted "credit," and all of the deposits by the packing company were payments to be applied in "reducing or satisfying" that credit, and whatever amount of such credit remained unpaid was within the terms of the guaranty.

2. The Capitol Packing Company is a corporation organized under the laws of this state, with a capital stock divided into

600 shares, of which 595 were issued, and during all the times in which the aforesaid liability of the corporation was incurred the appellant, Abby M. Parrott, was the owner and holder of 165 shares of said stock, and the appellant, Thomas Cole, of 25 shares. The plaintiff claims, in addition to a recovery upon the guaranty of the appellants, the right to recover from them respectively, as stockholders, their proportion of the aforesaid corporate obligation, and the superior court rendered judgment in its favor in accordance with this claim. The appellants contend that their guaranty was only a collateral security for their liability as stockholders; that their liability thereon was commensurate with their liability as stockholders, and that the court was not authorized to render judgment against them in their double capacity.

In the agreed case the liability of the packing company to the plaintiff is stated to be \$78,110, and it is stated that the plaintiff claims the right to recover from Mrs. Parrott upon her stockholder's liability the sum of \$21,844.32, and upon her liability as guarantor the sum of \$10,922.16; and from Mr. Cole upon his liability as stockholder the sum of \$3,309.75, and upon his guaranty the sum of \$1,323.89. The aggregate amount of the judgments against the defendants is less than the agreed amount of the corporate liability, but the judgments do not specify the amounts thereof rendered against the appellants upon their respective liabilities as guarantors and as stockholders. No exception, however, is made upon this ground, nor do the appellants claim that the judgment against them is incorrect in amount—their claim being that by reason of the guaranty ⁴⁸⁷ they are not liable in any amount as stockholders. The guaranty does not, however, contain any reference to the liability of the signers as stockholders, and, inasmuch as such liability is distinct from that arising upon their contract, if they had intended not to be bound as stockholders they should have caused words of release or limitation to be inserted in the guaranty. Their liability as stockholders existed by virtue of the statute, while their liability as guarantors was purely a matter of contract between them and the plaintiff, and the plaintiff had the right to demand the guaranty, in addition to their liability as stockholders, as a condition upon which it would give credit to the corporation. There was no connection between the two, or dependence of one upon the other, and, in the absence of any agreement to that effect, the plaintiff is not to be deprived of the right to enforce their statutory liability. No

inference of this nature is to be drawn from the similarity between the number of shares of stock held by the appellants, and the proportion of the credit which they guaranteed. In fact, their liabilities under the two obligations are not the same—that as guarantors being for a certain number of six-hundredths of the credit, while as stockholders they were liable for that number of five hundred and ninetieths.

The plaintiff is, of course, not entitled to recover from the defendants, whether as guarantors or as stockholders, or in both capacities, more than the amount of the corporate liability, but, as it appears from the record that the aggregate amount of the judgments is less than the agreed amount of the corporate liability, we cannot say that the record discloses any error in this respect. It is also stated in the agreed case that some stockholders did not sign the guaranty, and that some of the guarantors were not stockholders. The case also shows that the defendants in the action had 290 shares of the stock, but it does not appear that any of the guarantors, other than the defendants, were stockholders.

It is stated in the agreed case that the defendants shall be considered as having pleaded the statute of limitations upon any other matter than the guaranty, and appellants contend that their liability as stockholders is barred by this statute. The liability of a stockholder is an obligation created by statute, ⁴⁸⁸ and, under section 359 of the Code of Civil Procedure, is barred unless the action thereon is commenced within three years after the cause of action accrues: *Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162. It is unnecessary to consider the proposition presented by the appellants, that if the liability of a corporation is barred by the statute the stockholders may avail themselves of that fact as a defense to their own liability, since in the present case the liability of the packing company was not barred. Before the statute had run against its liability, it made its written acknowledgment thereof and promised to pay the same, and thus prevented the bar of the statute. The giving of this note had the effect to preserve its liability until the maturity of the note. The plaintiff's claim against the appellants as stockholders is not upon the note, but upon the liability originally created by reason of the advances made to the corporation. We have seen that the giving of this note did not affect the liability of the appellants upon their guaranty, since it did not affect the original liability of the corporation, and

for the same reason it did not affect their liability as stockholders.

Neither is their liability as stockholders barred by the three years' statute. The account with the packing company was opened October 5, 1891, and from that date until September 5, 1893, deposits were made by the packing company, from time to time, and its checks paid by the bank. Section 1479 of the Civil Code, providing for the application of payments, declares: "3. If neither party makes such application within the time prescribed herein, the performance (i. e., the payment) must be applied to the extinction of obligations in the following order: 1. Of interest due at the time of performance; 2. Of principal due at that time."

The superior court acted in accordance with this rule, and held that the deposits of the packing company should be applied, first, to the interest due at the time of making the several deposits, and next to the payment of the checks earliest in time, and that the application should be made as of the date of the several deposits, irrespective of the time that had elapsed between the earliest items and the commencement of the action. ⁴⁸⁹ The appellants claim that the court thus acted in disregard of their plea of the statute of limitations; that under this plea the court was not at liberty to apply any of the deposits in discharge of advances made more than three years prior to the time the application was made; that the application of the deposits, whether made by the court or the creditor, cannot be made after three years from the time that the liability accrued. We cannot assent to this proposition. Under section 462 of the Code of Civil Procedure, the plea of the statute of limitations is to be deemed "controverted" by the plaintiff, and whatever will defeat its effect may be shown upon the trial. The right to a correct application of payments is one of the elements in the plaintiff's right of action, and he is not to be deprived of the exercise of that right by a delay in bringing his action on for trial. The application of payments which is made by the court is to be made "in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best protect and maintain the rights of both parties": *Murdock v. Clarke*, 88 Cal. 390. The circumstances which are to guide the court may have arisen since the payment was made, but the application when made relates to the time of the payment. There could be no propriety in applying a payment to the discharge of an obligation incurred subsequent to the time when the payment was made.

It is next contended by the appellants that under their plea of the statute their liability as stockholders is limited to that portion of the corporate liabilities which were incurred subsequent to August 16, 1892—the agreed case having been filed August 15, 1895. At the time of the execution of the note of September 5, 1893, the statute of limitations had not run against any of the items of the account; and the parties thereto could at that time agree upon the mode and extent to which the previous deposits by the packing company should be applied in the extinction of its liability for the advances; and the making and acceptance of the note for an amount agreed upon between them must be regarded as an agreement, or acquiescence, on the part of the packing company, in their application to the extinction thereby of so much of the liability theretofore incurred as was not included in the note.

490 The appellants urge, however, that the plaintiff had, prior to that date, made an appropriation of a portion of the deposits to the payment of interest at the end of each month, and that, the appropriation having once been made, it was irrevocable, and that a different appropriation thereafter was unauthorized. This claim rests upon these facts: At the opening of the account the packing company agreed to pay interest upon the advances made to it, monthly, at the rate of seven per cent per annum. This interest upon overdrafts was, according to the usual course of business, paid by a memorandum check signed by the bank itself, and a list of the checks so drawn was handed to the packing company whenever its book was balanced. In the account upon the books of the bank these items of interest appear under date of the last day of each month, and amount to a little over \$7,000. It is claimed that by this mode the bank elected to allow the interest to compound and not to apply any subsequent deposits to its payment. Instead, however, of being an application of the deposits this action of the bank was in the nature of an additional loan to the packing company. It was equivalent to advancing to it the amount of the interest for the previous month, upon its check therefor, in the same mode that it would advance money upon its check for any other purpose. Deposits subsequently made were not applied by the bank to the payment of this interest, but were placed to the general credit of the packing company in its account upon the books of the bank.

From the copy of the account annexed to the agreed case it appears that upon many occasions the amount of the deposits

and of the checks drawn by the packing company upon the same day were identical, and from this fact the appellants contend that it should be held that these deposits and checks were parts of the same transaction, and were transactions independent of the general account between the packing company and the bank, and, consequently, the deposits so made should not be applied to the discharge of any of the earlier items of the account. There is nothing, however, in the record tending to show that these were independent transactions, except the identity of amount and date, and these items only constitute evidence from which an inference might be drawn that they were ⁴⁹¹ parts of independent transactions. They are not conclusive of the fact, and as the superior court has not drawn this inference, but its judgment has impliedly found the contrary, we must accept its finding as conclusive. It may be added that in the dealings between a bank and its customers the deposit is usually made before the checks are drawn, and, in the absence of some specific direction, there would be no presumption that a deposit was intended to be applied to a check that might be thereafter drawn.

The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

GUARANTY, ABSOLUTE.—NOTICE OF ACCEPTANCE of guaranty, absolute in its terms, need not be given in order to charge the guarantor: *Beebe v. Dudley*, 26 N. H. 249, 59 Am. Dec. 341; *Union Bank v. Coster*, 3 N. Y. 203, 53 Am. Dec. 280, and note; *Wilcox v. Draper*, 12 Neb. 138, 41 Am. Rep. 763.

GUARANTY—CONSTRUCTION OF.—The words of a guaranty are to receive a fair and reasonable interpretation, so as to attain the object and purpose of the instrument; and, if they are ambiguous, they must receive the construction most favorable to the rights of the guarantee who has advanced his money on that interpretation: *Note to Gates v. McKee*, 64 Am. Dec. 549. When the amount of the liability is limited, and the time is not, the contract should be construed as a continuing guaranty: *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. Rep. 581. That a guarantor is bound only by the precise terms of the contract guaranteed by him, and that a contract of guaranty will be strictly construed, see notes to *Hooper v. Hooper*, 48 Am. St. Rep. 508; *Taussig v. Reid*, 36 Am. St. Rep. 514.

GUARANTY—DISCHARGE OF GUARANTOR—TAKING OF NOTE.—A guarantor is discharged by an extension of time for the payment of the debt whose payment he guarantees: *Note to Peterson v. Russell*, 54 Am. St. Rep. 639. The fact that a principal gave his note for goods which he purchased on a written order will not discharge his guarantor's liability: *Wadsworth v. Allen*, 8 Gratt. 174, 56 Am. Dec. 137.

LETTERS OF CREDIT—CONTINUING GUARANTY.—A letter of credit must be construed by its own terms: *Lowe v. Beckwith*, 14 B. Mon. 184, 58 Am. Dec. 659. A letter of credit requesting another to let a third person have "what goods he calls for, and I will see that the same are settled for," is a continuing guaranty: *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713.

STATUTES—CONFLICT—CONSTRUCTION.—Special provisions in a statute relating to a particular subject matter must prevail over general provisions in other statutes in conflict therewith: *State v. Cornell*, 53 Neb. 556, 68 Am. St. Rep. 629.

PAYMENTS—APPLICATION OF—DEPOSITS.—If neither the debtor nor the creditor makes an application of a payment, the law will make it according to the justice of the particular case, in view of all the attendant circumstances: *Notes to Gard v. Stevens*, 86 Am. Dec. 54; *Phillips v. Herndon*, 22 Am. St. Rep. 67; *Frazier v. Lanahan*, 17 Am. St. Rep. 518. In the absence of the application of payments by the parties the law will, in the case of running accounts, apply them to the extinguishment of the items in the order of their dates: *Notes to National Park Bank v. Seaboard Bank*, 11 Am. St. Rep. 616; *Frazier v. Lanahan*, 17 Am. St. Rep. 518; *Gard v. Stevens*, 86 Am. Dec. 54. A bank holding the note of its customer is not, after its maturity, bound to apply moneys thereon subsequently deposited by the customer: *National Bank v. Smith*, 66 N. Y. 271, 23 Am. Rep. 48, and note. The acceptance of a note for the amount of a debt is not a payment thereof, unless the parties expressly so agree: *Johnston v. Barrills*, 27 Or. 251, 50 Am. St. Rep. 717.

KUHN *v.* SMITH.

[125 CALIFORNIA, 615.]

LANDLORD AND TENANT—TENANT FOR YEARS—WHO IS, AND HIS DUTY TO SURRENDER.—One in possession of agricultural lands, under a lease for a definite, fixed period, is a tenant for years, and, upon the expiration of his term, it is his duty to move without notice.

LANDLORD AND TENANT—TENANT AT WILL—WHO IS NOT—NOTICE.—A tenant who remains in possession after the expiration of his lease without the consent of the landlord, does not thereby become a tenant at will, entitled to a thirty-day notice before he can be ejected.

EJECTMENT—TENANT FOR YEARS—HOLDING OVER—NOTICE.—The owner of agricultural lands may, without notice, maintain an action of ejectment against a tenant for years who holds over, without the plaintiff's consent, after the expiration of the term.

Ejectment brought by the plaintiffs, Kuhn and others, against the defendant Smith. There was a judgment for the plaintiffs and the defendant appealed.

John H. Moore and Charles Clarke, for the plaintiff.

S. F. Leib, for the respondents.

617 GAROUTTE, J. This is an action of ejectment. Plaintiffs, by writing, leased certain agricultural lands to defendant

for a fixed, definite period—about ten months. Upon the expiration of the lease defendant refused to give up possession, and this action was commenced. Plaintiffs commenced the action some six weeks after the lease had expired, and defendant now rests his right of possession upon the claim that after the expiration of the lease he became a tenant at will, and by virtue of such tenancy he was entitled to a notice of thirty days (Code Civ. Proc., sec. 1162) before action could be brought to eject him. In other words, his only defense is that the action is prematurely brought. There is nothing whatever in the claim made. The defendant was not a tenant at will. Under his lease he was a tenant for years, and upon the expiration of his term it was his duty to move without notice. He had no rights of any kind which demanded a notice in writing in order that they might be cut off.

It is not the law of this state that a tenant who remains in possession, perchance a single day after the expiration of his lease, thereby becomes a tenant at will and must be served with a thirty-day notice before he may be ejected. Upon a similar state of facts it is said in *McKissick v. Ashby*, 98 Cal. 425: "Under the facts stated, we think that plaintiff had a right to re-enter when the term expired and to maintain an action for possession without previous notice or demand." It is also said in *Canning v. Fibush*, 77 Cal. 196: "And inasmuch as the lease expired by its own limitation there was no necessity of a notice to terminate it. . . . This being the case, we do not see how the defendants had any right to continue in possession, and, if they had no such right, why the plaintiff should not recover the premises, with damages for the detention." In *Perine v. Teague*, 66 Cal. 446, the syllabus is as follows: "A tenant who enters and continues in possession of the demised premises under a written lease until the expiration of the term, does not thereafter become a tenant at will by refusing to surrender that possession and by holding over without the consent of the lessor."

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—EJECTMENT.—NOTICE TO QUIT is not necessary to terminate a tenancy from year to year arising from the tenant holding over after the expiration of his term, and the landlord maintain ejectment against him without notice of his intention not to prolong the tenancy: *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724.

CASES
IN THE
SUPREME COURT
OF
DELAWARE.

TRUXTON v. FAIT & SLAGLE COMPANY.

[1 PENNEWILL (DEL.), 483.]

SALES—FRAUD OF BUYER—RESCISSION.—Although, as between the original parties, a sale and delivery of goods obtained by fraud is voidable and may be rescinded at the option of the seller and the goods reclaimed from the fraudulent purchaser, yet, if the goods have passed into the hands of a bona fide purchaser, for value, without knowledge or notice of the fraud, such purchaser will take a title which cannot be defeated by the defrauded seller.

SALES—FRAUD—RESCISSION AS AGAINST EXECUTION CREDITORS.—The right of a defrauded vendor to avoid a sale of goods obtained from him by the vendee's fraudulent and false representations as to his solvency may be exercised and the sale rescinded after the goods have been levied upon in the possession of the vendee, under an execution sued out by a creditor of the vendee whose debt was antecedent to the fraudulent sale, although he may be a bona fide creditor without notice or knowledge of the fraud.

CONSTITUTIONS — JURY TRIAL — INSTRUCTIONS.—A constitutional provision that judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law, is not violated by a charge with respect to matters of fact which are neither controverted nor in issue, where such charge may aid in the proper elucidation or application of the legal principles involved.

COURTS—STARE DECISIS—DOCTRINE OF.—While the maxim of stare decisis is strictly applied where titles to real estate have been acquired or commercial usages have been established under judicial decisions, yet where a decision contravenes, misunderstands, or misapplies the law, and a reversal will not disturb property rights or commercial usages, such a reversal becomes proper and necessary.

APPEAL—WRIT OF ERROR—REFUSAL OF NONSUIT.—A writ of error will not lie to the judgment of a court refusing to grant a nonsuit.

Charles F. Richards, Charles M.-Cullen, and Charles W. Cullen, for the plaintiffs in error.

Lewis C. Vandegrift, Albert F. Polk, and Charles M. Curtis, for the defendant in error.

491 RIDGELY, J. This was an action of replevin brought by Fait & Slagle Company, a corporation existing under the laws of the state of Maryland, the plaintiff below, to the October term, 1895, of the superior court of the state of Delaware in and for Sussex county, against Joseph D. Truxton and Planner J. Williams, defendants below, plaintiffs in error, for the recovery of 96,000 tin cans, alleged to have been sold by the said Fait **492** & Slagle Company to James B. Morrow and William J. Coulbourn, partners, trading under the firm name of Morrow & Coulbourn and then doing business as packers of canned goods in the town of Seaford, Sussex county. At the time the writ of replevin was issued there had been issued out of the said superior court five several writs of fieri facias attachment—one at the suit of Annie E. Coulbourn v. James B. Morrow and William H. Coulbourn for the real debt of \$2,000, with interest from the twenty-fifth day of August, A. D. 1895, and costs, and issued on the third day of July, A. D. 1895, being No. 340, to the October term of said court; another at the suit of William H. Coulbourn, Frank W. Coulbourn, and Joseph N. Coulbourn, executors of Michael Coulbourn, deceased, v. James B. Morrow and William H. Coulbourn, trading as Morrow & Coulbourn, for the real debt of \$1,000, with interest from the third day of June, A. D. 1891, and costs, issued on the third day of July, A. D. 1895, being No. 342, to October term, 1895, of said court; another at the suit of Frank W. Coulbourn and Joseph N. Coulbourn v. William H. Coulbourn for the real debt of \$5,181.82 with interest from the twenty-first day of June, A. D. 1895, and costs, issued on the third day of July, A. D. 1895, and being No. 344, to October term, 1895, of said court; another at the suit of the First National Bank of Seaford v. James B. Morrow and William H. Coulbourn for the real debt of \$4,450, with interest from the second day of July, A. D. 1895, and costs, issued on the third day of July, A. D. 1895, being No. 346, to October term, 1895, of said court; and the other at the suit of the Sussex National Bank of Seaford v. James B. Morrow and William H. Coulbourn for the real debt of \$3,000, with interest from the second day of July, A. D. 1895, and costs, issued on the fifth day of July, A. D. 1895,

and being No. 350, to October term, 1895, of said court; that each of said writs was on the day it was issued duly delivered to Joseph D. Truxton, then being sheriff of Sussex county, to be executed, and that the said Joseph D. Truxton, then sheriff as aforesaid, under and by virtue of said writs of execution, seized and levied upon the goods and chattels of the said Morrow & Coulbourn, and, among other goods and chattels, ⁴⁹³ seized and levied upon the 96,000 tin cans in controversy in this suit, and that the said Planner J. Williams was deputed by the said Joseph D. Truxton, then sheriff as aforesaid, to guard and watch over the property levied upon under said executions. At the time the said writ of replevin was issued at the suit of Fait & Slagle Company, the said 96,000 tin cans had been seized and levied upon by the said Joseph D. Truxton, then sheriff as aforesaid, as the property of the said Morrow & Coulbourn under and by virtue of the above-mentioned writs of fieri facias attachment and when the said writ of replevin was served upon the said Joseph D. Truxton, then sheriff as aforesaid, he gave counter-bond, or, as it is sometimes called, a property bond, and retained the said 96,000 tin cans, and afterward sold the said tin cans, together with the other property levied upon, and applied the proceeds of said sale to the executions in his hands according to their priority.

At the trial in the court below it was alleged by the plaintiff below that, in January, 1895, the said Morrow & Coulbourn contracted with the plaintiff below for the purchase of 96,000 tin cans, and that said cans in pursuance of said contract were delivered to the said Morrow & Coulbourn at Seaford, their place of business, in three lots, on the twenty-fifth, twenty-seventh and twenty-ninth days of June, 1895, and it was then contended by the plaintiff below that the said plaintiff was induced to make the sale and delivery of the said tin cans to the said Morrow & Coulbourn by reason of the false and fraudulent representations of the said Morrow and Coulbourn, or their accredited agent, as to their solvency, and therefore that the said plaintiff was entitled to have the cans delivered to them by the sheriff, on demand, under the writ of replevin. On the other hand, the defendants below at the trial denied that any false or fraudulent representations of solvency were made by the said Morrow & Coulbourn, or any accredited agent for them to the said plaintiff below, and that, even if such false and fraudulent representations were made, the plaintiff below did not make sale of said tin cans on the faith of such representations, but re-

lied on other sources of information, ⁴⁹⁴ and further that, admitting that said Morrow & Coulbourn obtained the said tin cans by false and fraudulent representations as to their solvency, yet, as the plaintiffs in the above-stated executions were bona fide creditors of the said Morrow & Coulbourn, without notice or knowledge of such false and fraudulent representations, their levies under the above-mentioned executions would hold good against the seller who had parted with his goods by means of such false and fraudulent representations. There were other contentions made by the defendants below at the trial which it is not necessary to notice here, as they were abandoned at the hearing of the cause in this court. The charge to the jury will be found in full in the case of *Fait v. Truxton*, 1 Pennewill (Del.), 41.

The assignments of errors in this court by the plaintiffs in error were sixteen in number, but at the hearing in this court the counsel for the plaintiffs in error abandoned and withdrew the first, second, sixth, seventh, eighth, tenth, and thirteenth, leaving the following exceptions, upon which they relied, viz.:

3. That the court erred in not charging the jury that no recovery could be had by plaintiff in this action, inasmuch as no proof was introduced to show that the execution creditors of Morrow & Coulbourn were cognizant of a fraud practiced by said firm upon the plaintiff, and consequently said execution creditors occupied the same position as purchasers for value without notice, as requested by defendant's counsel.

4. That the court erred in not charging the jury, as requested by counsel, that goods obtained by fraudulent representations may be reclaimed by the seller from the purchaser, if he seasonably rescind the sale, yet if purchaser sells them for a valuable consideration to a third person who has no notice of the fraud, or consigns them to such person for sale, and he advances money thereon before the first seller interposes, such purchaser or consignee will hold the goods against the first seller.

5. That said court erred in not charging the jury, as requested by defendant's counsel, that where goods purchased ⁴⁹⁵ under fraudulent representations, as to solvency of the purchasers, are levied upon by execution of a bona fide judgment creditor, having no notice or knowledge of any such representation, the execution lien cannot be disturbed, but will hold good against the defrauded seller.

9. That the court erred in charging the jury that the debts due the execution creditors, who levied upon the replevied goods, were contracted prior to the alleged fraudulent sale.

11. That the court erred in charging the jury that: "We therefore instruct you that if you believe these cans were purchased by Morrow & Coulbourn from Fait & Slagle by fraudulent representations, and, while in the hands of Morrow & Coulbourn, were levied upon under executions issued on the judgments of other creditors, whose debts were antecedently contracted as aforesaid, such liens will not hold good against the defrauded seller, who has elected to avoid the sale, or prevent him from recovering these goods or the value thereof in this action."

12. That the court erred in not charging the jury, as requested by the defendants' counsel, that: "When goods are purchased under fraudulent representations as to the solvency of the purchasers, and levied, by executions of bona fide judgment creditor having no notice or knowledge of any such representations, the execution lien cannot be disturbed, but will hold good against the defrauded seller."

14. For that the said court erred in reversing the case of *England v. Forbes*, 7 Houst. 301, the questions of law involved in said case being precisely similar as those in this case, inasmuch as said case of *England v. Forbes*, 7 Houst. 301, was the unanimous decision of the superior court, made after due deliberation, whereas the said case was overruled by a mere majority of the judges composing said court, one judge dissenting.

15. That the said court erred in not granting a nonsuit as asked in this case, inasmuch as the principles involved in ⁴⁹⁶ this case were *res adjudicata* in the decision of *England v. Forbes*, 7 Houst. 301.

16. That the said court erred in not granting a nonsuit, and adhering to the decision in case of *England v. Forbes*, 7 Houst. 301, since we now have two opposite decisions on the same subject matter, thus violating the principle of *stare decisis*.

As some of the above-quoted assignments of errors, and especially the third, fourth, fifteenth, and sixteenth assignments were not pressed and were but very briefly alluded to in the arguments of the counsel for the plaintiffs in error, we do not deem it necessary to consider each of the errors assigned separately, but to consider the principal ones upon which the counsel for the plaintiffs in error relied, as we think a consideration of these will dispose of the other errors assigned. As to the fourth assignment of error, however, we have only to say that it is not sustained by the facts. For the chief justice in his charge to the jury, while quoting from the case of *Mears v. Waples*, 3

Houst. 620, says: "A purchaser for a valuable consideration, without knowledge or notice of fraud, takes a valid title from the fraudulent buyer, which cannot be defeated by the original vendor. And a consignee of goods, who in good faith makes advances upon them, stands precisely in the same position as a purchaser for value, and the same principles of law in this regard apply to this case; and permit me to say that this doctrine of the law is most reasonable and just, because the owner having voluntarily parted with his goods and clothed the buyer with a title which is good until the seller avoids it—which he may do or not as he pleases—it is through his own act that the buyer from him is enabled to sell the goods, and therefore a bona fide purchaser of them, without knowledge of the circumstances, ought not to be made suffer." It will be observed that the fifth, eleventh, and twelfth assignments of errors are substantially alike, though differently expressed, and involve the same principles of law. We shall therefore consider these exceptions together, as involving the same legal principles; and we think that a consideration of these assignments will dispose of the third assignment of error.

⁴⁹⁷ In the case of *Mears v. Waples*, 3 Houst. 620, 621, Chief Justice Gilpin in charging the jury, among other things, used this language: "A contract which has been incepted in fraud is so vitiated by it that it may be rescinded and avoided, or not, at the option of the injured party. And, if it be a contract of sale, the seller may reclaim the goods, provided the rights of a third party as a bona fide purchaser of them have not intervened. But the right of the seller to rescind or avoid the contract, and reclaim the goods from the buyer on the ground of fraud, exists only so long as the goods are in the hands of the fraudulent purchaser, or of some one who has taken them of such fraudulent purchaser with knowledge of the fraud by which they were originally obtained. I have already said that, in case of fraud on the part of the buyer, the seller may avoid the contract before the interests of third parties, in good faith and for value, become involved in the transaction. Until then it is at the seller's option to avoid or affirm the contract. But, until the contract is rescinded or avoided, the title or property in the goods is in the buyer, and he may sell or dispose of them to a bona fide purchaser for value, and thus vest in him a good, indefeasible, and irrevocable title to the property. It therefore follows, both justly and logically, that a purchaser for a valuable consideration, without knowledge or notice of fraud, takes

a valid title from the fraudulent buyer, which cannot be defeated by the original vendor. And a consignee of goods who in good faith makes advances upon them stands precisely in the same position as a purchaser for value, as against the original vendor, and the same principles of law in this regard apply to this case. And permit me to say that this doctrine of the law is most reasonable and just, because the owner having voluntarily parted with his goods and clothed the buyer with a title which is good until the seller avoids it, which he may do, or not, as he pleases, it is through his own act that the buyer from him is enabled to resell the goods; and, therefore, a bona fide purchaser of them without knowledge of the circumstances ought not to be made suffer. After delivery of the goods in pursuance of a sale, the seller cannot rescind the contract, or reclaim the goods on the ⁴⁹⁸ ground of fraud without proving deceptive assertions, or false representations, in some form or other, fraudulently made to induce him to part with his property. Mere insolvency of the buyer, though well known to himself and concealed from the seller, does not, in itself, furnish sufficient grounds for rescinding a contract of sale. Nor will the fraudulent purchasing and obtaining of goods with an intention of never paying for them of itself render the contract of sale absolutely void, even as between the seller and buyer; yet it will render it voidable at the election of the seller, but, if the goods are sold by such fraudulent buyer to an innocent third party for value, the latter will take and hold them by a valid title. And, therefore, it may be laid down as settled law that although, as between the original parties, a sale and delivery of goods obtained by fraud is voidable, and may be rescinded at the option of the seller, and the goods reclaimed from the fraudulent purchaser, yet, as heretofore intimated, if the goods have passed into the hands of a bona fide purchaser for value, without knowledge or notice of the fraud, such purchaser will take a title which cannot be revoked or impeached by the defrauded seller." We quote largely, as we think the principles enunciated by Chief Justice Gilpin are material to the proper consideration of the case before us.

The case of *Mears v. Waples*, 4 Houst. 62, was taken up to the court of errors and appeals on a writ of error and exceptions to the charge, where all the exceptions were overruled and the judgment below affirmed; we do not think, however, that there were any exceptions taken to that part of the charge of the court which we have just quoted, and we now reaffirm and

approve the principles of law in relation to fraudulent sales and the right of the vendor to rescind the sale, as laid down by Chief Justice Gilpin in the extracts above quoted.

It was contended by the counsel of the plaintiffs in error that where goods have been purchased by means of fraudulent representations as to the solvency of the purchasers, and levied upon by execution of a bona fide judgment creditor having no notice or knowledge of any such representations, the execution lien cannot be disturbed, but will hold good against the defrauded ~~499~~ seller, or, in other words, that a bona fide execution creditor, having a levy on goods fraudulently purchased, stands in the same position as a bona fide purchaser of goods from the party who has obtained them by fraudulent representations. In support of this contention the case of *England v. Forbes*, 7 *Houst.* 301, was relied upon. In that case Chief Justice *Comegys*, who charged the jury, said among other things: "If, in the case of such vitiated contract of sale, the goods sold have been delivered to the buyer, who sells them to another who buys them bona fide, without any notice or knowledge on his part of the fraudulent feature of the sale, such innocent purchaser acquires a valid title to them, which cannot be defeated by the original seller. Likewise, where, after possession has been obtained by a party who purchases under a fraudulent misrepresentation as to his solvency, they be levied upon by an execution issued at the suit of a bona fide judgment creditor, having no notice or knowledge of any such representation, his execution lien cannot be disturbed by, but will hold good against, the defrauded seller." It will thus be seen that the court in the case of *England v. Forbes*, 7 *Houst.* 301, places a bona fide execution creditor, having a levy upon goods which were obtained by fraudulent representations, in the same position as a bona fide purchaser of goods from one who has obtained them by fraudulent representations; and in that case, if the facts are reported correctly, the execution was issued antecedently to the fraudulent purchase of the goods. The same contention was made by the defendants below, plaintiffs in error, at the trial and the same case, *England v. Forbes*, 7 *Houst.* 301, was cited and relied upon. In answer to this contention, Chief Justice *Lore*, in his charge to the jury, uses this language: "We are asked by the defendants to charge you that, where goods are purchased under fraudulent representations as to the solvency of the purchaser, and levied upon by execution of a bona fide judgment creditor, having no notice or knowledge of any such

representations the execution lien cannot be disturbed, but will hold good against the defrauded seller. We cannot so charge. We do not think this proposition is sound in principle or supported by well-considered authority in a case like the present, where ⁵⁰⁰ the debts due the execution creditor, who has levied upon the replevied goods, were contracted prior to the alleged fraudulent sale.

"It is true that in *England v. Forbes*, 7 Houst. 306, it was so decided. It is there, however, coupled with and placed on the same ground as that of the bona fide purchaser for value. Neither the reason nor the authority for such ruling is given. The case seems to stand alone, and is in conflict with an unbroken line of authorities from the leading case of *Lickbrow v. Mason* down to the present time. The case is not very clearly reported as to the facts and questions involved; but, if it is correctly reported, we think that the ruling therein is very questionable, and the majority of this court hold that it should be disregarded." To this part of the charge the assignments of errors which we are now considering especially relate; and it devolves upon us to decide whether the court erred in overruling so much of the decision in *England v. Forbes*, 7 Houst. 306, as held that a levy upon goods, which have been purchased, by means of fraudulent representations by a bona fide execution creditor of the fraudulent purchaser without notice or knowledge of such fraud could not be disturbed by, but would hold good against the defrauded seller. It must be observed that the court in that case said nothing as to the fact whether the debts for which the execution was issued were contracted prior or subsequent to the fraudulent purchase, but, from the report of the case, it is clear that the debts for which the execution was issued were contracted prior to the fraudulent purchase; and we must consider the charge of the court as applicable to the facts proved in that case, and therefore that the decision applied to executions issued for the collection of debts, which were contracted prior to the fraudulent purchase.

The case of *England v. Forbes*, 7 Houst. 301, stands alone and unsupported by authority; at least, no decision of any court supporting this decision was cited by the counsel of the plaintiffs in error, and we have been unable to find any decision which would support the ruling in that case. On the contrary, there is an unbroken line of authorities in other states directly in conflict with this decision, some of which, out of the many which might be cited, ⁵⁰¹ we will here cite: *Jordan v. Parker*, 56 Me.

557; Poor v. Woodburn, 25 Vt. 234; Field v. Sterns, 42 Vt. 106; Bradley v. Obear, 10 N. H. 477; Oswego Starch Co. v. Lendrum, 57 Iowa, 573, 42 Am. Rep. 53; Naugatuck etc. Co. v. Babcock, 22 Hun, 481; Atwood v. Dearborn, 1 Allen, 483, 79 Am. Dec. 755; American Exp. Co. v. Willsie, 79 Ill. 92; Devoe v. Brandt, 53 N. Y. 462; Buffington v. Gerrish, 15 Mass. 156, 8 Am. Dec. 97; Schweizer v. Tracy, 76 Ill. 345; Williamson v. New Jersey etc. R. R. Co., 29 N. J. Eq. 311.

Is the ruling in the case of England v. Forbes, 7 Houst. 306, reasonable or founded upon any sound legal principles? The chief justice in that case likens the execution creditor to a bona fide purchaser for value, but, as we think, without reason. As was said by the court in the case of Oswego Starch Co. v. Lendrum, 57 Iowa, 579, 42 Am. Rep. 53, "as an attaching creditor parts with no consideration, and does not change his position as to his claim to his prejudice, he stands in the shoes of the vendee. It cannot be questioned that the right of rescission as between the vendor and vendee inheres in the contract and attaches to the property. The innocent purchaser for value occupies a different position, and his rights are, therefore, different."

In the case of Schweizer v. Tracy, 76 Ill. 351, the court says: "The claim of an attaching creditor to protection is not of equal strength with that of a bona fide purchaser for a valuable consideration. He parts with nothing in exchange for the property, nor does he take it in satisfaction of any precedent debt. The property is merely seized for the purpose of having it afterward so appropriated. The attaching creditor, by means of his attachment, obtains but a lien. It is a well-settled rule, certainly of equity, that the general assignees of a bankrupt take his estate subject to every equitable claim which exists against it by third persons; and so it is with judgment creditors, as respects the lien of their judgments."

We think the ruling in the case of England v. Forbes, 7 Houst. 301, on the rights of execution creditors, having levies on goods obtained by means of fraudulent representations, is unsupported by authority and not founded on any sound legal principles. We ⁵⁰² believe that the law as laid down in that case would open the door to the perpetration of the grossest frauds. Any insolvent person, who might desire to pay the debts owing by him to his favored creditors, might, by the grossest fraudulent representations as to solvency, procure a stock of goods or other personal property, and immediately when delivered to him, concealing his fraud, confess judgment in favor

of those creditors whom he might prefer, so that such creditors could at once levy upon the property so fraudulently purchased by him, and thus enable them to have their debts paid out of the property so fraudulently purchased, leaving the innocent defrauded seller without any remedy. Besides, it generally happens that it is only after executions have been issued and levies made thereunder that a vendor, who has sold his goods by means of false and fraudulent representations as to the solvency of the purchaser, discovers the fraud which has been practiced upon him.

For these reasons, together with the reasons assigned by the chief justice in his charge, which we deem it unnecessary to repeat, we are of opinion that in the case of *England v. Forbes*, 7 Houst. 301, where the execution was for debts contracted before the alleged fraudulent sale, the court erred in ruling that after possession of goods has been obtained by a party who purchased under a fraudulent representation as to his solvency, they be levied upon by an execution issued at the suit of a bona fide judgment creditor, having no notice or knowledge of any such representation, his execution lien cannot be disturbed by, but will hold good against, the defrauded.

We now hold that the right of a defrauded vendor to avoid the sale of goods obtained from him by false and fraudulent representations of the vendee as to his solvency, cannot be defeated or impaired by a levy on the goods fraudulently obtained, while in the possession of the fraudulent purchaser, under execution process issued at the suit of a creditor whose debts were contracted prior to the fraudulent sale, although such creditor may be a bona fide creditor and without notice or knowledge of the fraud.

⁵⁰³ We now proceed to the consideration of the ninth assignment of errors, which was pressed with earnestness upon the court. This exception is as follows: "That the court erred in charging the jury that the debts due the execution creditors who levied upon the replevied goods were contracted prior to the alleged fraudulent sale."

The chief justice, in delivering the charge to the jury, at the trial in the court below, starts by stating the contentions of the plaintiff below, and, among other contentions of the plaintiff below, he states the following as one of them: "That within a few days after the delivery of the cans at Seaford, they were levied upon by the defendant, Truxton, as sheriff, under sundry executions issued upon judgments in favor of other creditors of

said Morrow & Coulbourn, which other debts were contracted prior to the sale and delivery of the cans." Further on in his charge, when alluding to the contention of the defendants below that "where goods are purchased under fraudulent representations as to the solvency of the purchasers, and levied upon by execution of a bona fide judgment creditor having no notice or knowledge of any such representation, the execution lien cannot be disturbed, but will hold good against the defrauded seller," the chief justice says, "We cannot so charge. We do not think this proposition is sound in principle or supported by well-considered authority in a case like the present, where the debts due the execution creditor, who has levied upon the replevined goods, were contracted prior to the alleged fraudulent sale." Subsequently, the chief justice adds: "We therefore instruct you that if you believe these cans were procured by Morrow & Coulbourn from Fait & Slagle, by fraudulent representations, and while in the hands of Morrow & Coulbourn were levied upon, under executions issued on the judgments of other creditors, whose debts were antecedently contracted as aforesaid, such levies will not hold good against the defrauded seller, who has elected to avoid the sale or prevent him from recovering these goods or the value thereof in this action." These, we believe, are the only expressions in the charge where allusion is made to the fact that the debts for which the executions were issued and levies made were ⁵⁰⁴ contracted antecedently to the alleged fraudulent purchase and when first used by the chief justice he was only stating the contentions of the plaintiff below, and when last used, as above stated, he submits it to the jury as a fact for their consideration and determination. The charge must, of course, be considered by us as a whole. It is true that in one part of the charge quoted above, the chief justice does assume it to be a fact that the debts for which the executions were issued were contracted prior to the alleged fraudulent purchase, for he says, "in a case like the present, where the debts due the execution creditor who has levied upon the replevined goods were contracted prior to the alleged fraudulent sale." Subsequently, however, he leaves this as a matter of fact for the consideration of the jury and adds: "It is for you to apply the law as stated by the court to the facts in this case. Of these facts you are the sole judges, and you are to determine them not from any statement in this charge, but from what you heard from the witnesses who testified in the case."

Section 22 of article 4 of our recently amended constitution declares: "Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law." The counsel for the plaintiffs in error contended that the expressions of the chief justice in his charge, in relation to the time when the debts for which the executions were issued were contracted, were obnoxious to the provisions of the constitution above quoted and were misleading to the jury.

We have carefully read over and considered the whole testimony which was introduced in this case before the court and jury in the trial below. Mr. Fait, a witness for the plaintiff below, in the course of his testimony stated, substantially, that Mr. Coulbourn, a member of the firm of Morrow & Coulbourn, told him that these creditors whom he had preferred were of long standing, some as far back as 1891, and prior to the contract for the sale of the tin cans. Mr. Kirwan, another witness for the plaintiff below, testified substantially, in the course of his testimony, that some of them (judgment creditors) had been standing some three or four or five years possibly—certainly three or four. The same ⁵⁰⁵ witness, further on in his testimony, stated that they, meaning Morrow & Coulbourn, admitted to him that the judgments they confessed were of long standing, several years prior, three or four years—possibly, five years. Henry M. Baker, cashier of the First National Bank of Seaford, a witness for the defendants below, who seems to have been called for the purpose of proving the solvency of Morrow & Coulbourn, among other things testified substantially that from October, 1894, his bank gave a line of discounts to Morrow & Coulbourn to an amount ranging from \$3,000 to \$3,500 and in the summer to about \$5,000, but in the summer of 1895 the loans did not amount to \$5,000. And that the Sussex National Bank of Seaford gave credit to the said Morrow & Coulbourn to the amount of \$3,000; that his bank made advances to Morrow & Coulbourn, in June, 1895, to the amount of \$450 or \$950, he did not recollect which. If Morrow & Coulbourn "reduced their notes, which I think they did, to \$3,000 at the end of 1894, we let them have \$950, but I am not clear whether they reduced their notes to \$3,000 or \$3,500. If it was \$3,500 we only let them have \$450." When questioned as to what time in June these last advances were made, he stated that it was in the early part of June, 1895. The witnesses above named are the only witnesses who gave any testimony as to the

time when the debts for which the executions were issued were contracted. It will be remembered that the tin cans in question were delivered to Morrow & Coulbourn, at Seaford, in three lots, on the twenty-fifth, twenty-seventh, and twenty-ninth days of June, 1895. It is certain that three of the five writs of fieri facias attachment, viz., Nos. 340, 342, and 344 to the October term, 1895, were for debts contracted prior to the delivery of the tin cans, as the real debt for which these executions were issued bears interest from dates prior to the delivery of the tin cans. The aggregate amount of the real debt, of these executions, exclusive of interest and costs, is the sum of \$8,181.82, which is very largely in excess of the value of the tin cans, their value being estimated at about \$1,777, without interest, and, including interest to the day when the charge of the chief justice was delivered, would be \$2,016. The fourth writ of fieri facias attachment being No. 346, to October ⁵⁰⁶ term, 1895, and issued at the suit of the First National Bank of Seaford, was for the real debt of \$4,450, interest from the second day of July, 1895. And the last or fifth writ of fieri facias attachment being No. 350, to October term, 1895, and issued at the suit of the Sussex National Bank of Seaford, was for the real debt of \$3,000, interest from the second day of July, 1895.

All of these writs of execution were issued upon judgments confessed under warrants of attorney for the confession of judgments annexed to the bonds; and from the testimony in the case, especially that of Mr. Baker, and which is undisputed, the debts for which these bonds with warrants of attorney annexed were given to the First National Bank of Seaford and the Sussex National Bank of Seaford must have been for debts contracted prior to the twenty-fifth day of June, 1895. At the trial of the case no claim was made by the counsel for the defendants below that any of the debts for which the executions were issued were contracted subsequent to the delivery of the tin cans. In not one of the several prayers of the counsel for the defendants below, eight in number, is there a claim, or suggestion, or even intimation, that the debts for which the executions were issued were contracted subsequent to the delivery of the tin cans. From the whole record of the trial, it is apparent that the fact that the debts for which these executions were issued were contracted prior to the delivery of the tin cans was not disputed or in issue. Certainly, it was in the power of the defendants below to have proved that these debts were contracted subsequent to the delivery of the tin cans, had such been the

fact, as all the plaintiffs in the executions must have known when their debts were contracted and were directly interested in the result of the trial, the sheriff being indemnified by them; and, if they had relied upon the fact that their debts were contracted subsequent to the delivery of the tin cans, the onus probandi would have been on them to prove such fact. All the proof, however, submitted at the trial on this point was to the effect that the debts for which the executions were issued were contracted prior to the delivery of the tin cans, and there was no proof whatever to the contrary.

507 Judge Grubb, who sat at the trial and who dissented from the majority of the court in overruling the case of *England v. Forbes*, 7 Houst. 301, in the course of his opinion delivered on the motion for nonsuit, and while commenting on the case of *Fait & Slagle Co. v. Truxton*, 1 Pennewill (Del.), 34, said: "That case shows that it was not one where an execution creditor had given credit after the alleged fraudulent sale, but was a case like that now before us of a debt contracted and of a credit given before the time of the alleged fraudulent sale." It certainly appears from this remark of Judge Grubb that he considered it an undisputed fact, and a fact not in issue at the trial, that the debts for which the executions were issued were contracted, and the credit given, before the alleged fraudulent sale.

We therefore conclude from the whole record and proceedings in the trial that the fact that the executions issued were for debts contracted prior to the alleged fraudulent sale and delivery of the tin cans was not in dispute or in issue. Therefore, we are of the opinion that, upon consideration of the whole charge, the jury could not have been misled nor the defendants below prejudiced by the statements made by the chief justice in his charge in regard to this matter. And we think that a statement by a judge, in charging the jury, of matters of fact which are uncontroverted and not in dispute nor in issue, where such statement may be material for the proper elucidation or application of the legal principles involved, would not be in conflict with the provisions of section 22 of article 4 of our lately amended constitution.

We now pass on to the consideration of the fourteenth assignment of errors, that the court erred in reversing the case of *England v. Forbes*, 7 Houst. 301, which was pressed with earnestness upon the court. This involves a consideration of the well-known maxim of *stare decisis*. Chancellor Kent, in his

Commentaries, volume 1, page 476, while treating of the maxim of stare decisis says: "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that ⁵⁰⁸ decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and pretty implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture with confidence to buy and to trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law. . . . But I wish not to be understood to press too strongly the doctrine of stare decisis, when I recollect that there are one thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."

⁵⁰⁹ We approve of these remarks of Chancellor Kent and think that they should be borne in mind by the judges when called upon to reverse a former decision made by the same court; and that they should proceed cautiously in such reversals as

there is always a resort to the supreme court whose duty it is to correct the errors of inferior tribunals. The maxim of *stare decisis* has generally been strictly applied where titles to real estate have been acquired or commercial usages have been established under decisions of the court even where such decisions may have been erroneous, for the reason that a reversal of such decisions would disturb property rights already acquired and would work harm and mischief upon those who have honestly invested their means upon the faith of such decisions. But where a decision contravenes a plain principle of law, or where, in such decision, the law has been misunderstood or misapplied and a reversal will not disturb property rights already acquired or make innovations on established commercial usages, it may then become the duty of the judges to reverse an erroneous decision of the same court. In the case of *McFarland v. Pico*, 8 Cal. 631, the court says: "We would not disregard a decision of this court, deliberately made, unless satisfied that it was clearly erroneous. But the highest regard for the doctrine of *stare decisis* does not require its observance when a plain rule of law has been violated." In the case of *Paul v. Davis*, 100 Ind. 428, Justice Elliott, in delivering the opinion of the court, uses this language: "Consistency purchased by adherence to decisions at the sacrifice of sound principle is dearly bought. But we deem it unnecessary to further pursue this discussion, for we know quite well that there is not a court in England or America that has not corrected erroneous departures from the principles of justice by overthrowing previous decisions." And later on the same judge adds: "Much as we respect the principle of *stare decisis*, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions, we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none."

⁵¹⁰ We have, above, expressed our views as to the ruling of the court in the case of *England v. Forbes*, 7 Houst. 301, so far as the same relates to the rights of execution creditors whose debts were contracted prior to the alleged fraudulent sale, and we are of the opinion that such ruling was erroneous. In that case, the ruling was to the rights of execution creditors and the reversal of such ruling cannot disturb property rights or make innovations in commercial usages. The defendants below parted with no right nor gave up anything of value in relying on the

principles of law stated in *England v. Forbes*, 7 *Houst.* 301. As was remarked by the counsel of the defendant in error, the reversal of *England v. Forbes*, 7 *Houst.* 301, is in the interest of justice, not to this defrauded vendor only, but to all persons who may be so defrauded in the future.

We think, therefore, that there was no error in the court below in reversing the ruling in the case of *England v. Forbes*, 7 *Houst.* 301, in relation to the rights of execution creditors whose debts were contracted prior to the alleged fraudulent sale. If we were to hold otherwise and to reverse the court on this ground and remand the case for a new trial, the court, on such new trial, would be bound by our decision to lay down the law as ruled in the case of *England v. Forbes*, 7 *Houst.* 301, and if, upon such ruling, the plaintiff should except and bring the case before the court again, we should be bound to reverse the court for the error in the ruling and for doing what we had virtually ordered them to do. The folly of such a decision is apparent.

As to the fifteenth and sixteenth assignments of errors, that the court erred in not granting a nonsuit, we need only say that in the case of *May v. Curry*, 4 *Harr.* 265, decided in the court of errors and appeals, of this state, June term, 1845, that court held that a writ of error will not lie to the judgment of a court granting or refusing a nonsuit. We adhere to that decision.

The judgment of the court is that all the errors assigned be overruled and that the judgment below be affirmed.

Limitations upon the Doctrine of Stare Decisis.*

The reasons of public policy from which the maxim of stare decisis receives its force are well understood. Respect for precedent is an essential part of our system of jurisprudence, and has been the molding force under which that system has developed. The doctrine of stare decisis, however, refers not so much to the respect due to legal precedents in general, as to the obligation which rests upon a court having once decided a question to forever afterward decide the same question in the same manner. Where the initial decision is not clearly incorrect, the reasons for future adherence thereto are most patent. It is of paramount importance that the rules of law which apply to property, affect business and commerce, and touch the private life of the citizen, should be plain in their significance, and settled and permanent in their form. Few things can so seriously cripple commerce and derange business as instability or uncertainty in the law governing them. It is therefore held with good reason that when a rule by which the title to real prop-

* REFERENCE TO MONOGRAPHIC NOTES.

Stare decisis: 27 *Am. Dec.* 631-633.

erty is to be determined has become established by positive law or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice in the abstract, are of far less importance than that it should itself be constant and invariable: *Smith v. McDonald*, 42 Cal. 484; *Rockhill v. Nelson*, 24 Ind. 422; *Gilman v. Philadelphia*, 3 Wall. 713.

There are to be found numerous cases which have adhered to illogical and erroneous rules laid down in earlier decisions of the same courts, rather than disturb property rights and legal titles which in the intervening time had become based upon such rules. Said Thayer, J., in *Paulson v. Portland*, 16 Or. 450, 457: "It would be better, no doubt, if all judicial decisions were made upon correct logical principles; but that cannot be while intellectual infirmity exists; and experience has shown that it is less injurious to endure the evils of an unsound precedent than to change it when the result would cause confusion, and disappoint and damage parties who have relied upon it as an established rule of law." To the same general effect: *Field v. Goldsby*, 28 Ala. 218, 65 Am. Dec. 341; *Hopkins v. McCann*, 19 Ill. 113; *Reichert v. McClure*, 23 Ill. 516; *Pond v. Irwin*, 113 Ind. 243; *Reed v. Ownby*, 44 Mo. 204; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159.

What Matters are within the Protection of Stare Decisis.—Our inquiry being as to the circumstances under which courts will disregard the doctrine of stare decisis, we will omit from our consideration cases wherein are shown the circumstances under which the doctrine will be adhered to. We must first ascertain the scope of the protection of the maxim stare decisis. The mandate of the maxim is to let that which has been decided stand undisturbed. It becomes necessary, then, to know just when a matter has been decided, so that it no longer remains an open question. In order that a prior decision of a court shall govern a later decision under the maxim stare decisis, such prior decision must be in point: *Gray v. Gray*, 34 Ga. 499. As a test to determine whether a conclusion of law in any adjudicated case is a precedent in a subsequent one, it is said that "the value of the first, usually, is measured by its similarity or dissimilarity to the second in its controlling facts. And even if the court announcing the conclusion misapprehends or mistakes the facts, the conclusion, to be of any value as a precedent, must be taken as applicable to the facts as assumed by the court; they, as concerns the judgment, are the facts, and, whether existing or nonexisting, either prompt or compel the conclusion of law that determines the judgment": *Yoders v. Amwell Township*, 172 Pa. St. 447, 51 Am. St. Rep. 750.

The reasoning, illustrations, or references contained in the opinion of a court are not authority, not precedent, but only the points in judgment arising in the particular case before the court. It is the conclusion only, and not the process by which it is reached, which is the opinion of the court and authority in other cases: *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637, 62 Am. Dec. 424. The authority of a decision must be coextensive with the facts upon

which it is made: *Grimes v. Bryne*, 2 Minn. (*89), 72; *Gage v. Parker*, 178 Ill. 455. It is a question of what points were at issue and necessarily decided: *Knight v. St. Louis etc. Ry. Co.*, 40 Ill. App. 471. So, in order to give a decision construing a statute the force of stare decisis, the construction must be directly involved, and must be of the identical statute involved in the later case: *St. Louis etc. Ry. Co. v. Fowler*, 142 Mo. 670. But a decision is authority upon two questions arising in the case, when both were discussed by counsel, and both were considered and determined in the opinions delivered, even though it does not expressly appear that all the members of the court, who voted for the general result reached, concurred as to both questions: *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376.

It has even been held that the doctrine of stare decisis will be applied with respect to a legal proposition which, though involved in two cases, was not presented to the consideration of the court in the one first decided. Thus, in California, trust deeds made for the purpose of securing the payment of debts were assailed on the ground that they did not pass the legal title, but must be construed as mere mortgages. Something more than a score of years later, deeds of the same character were assailed on the ground that they created perpetuities, or trusts forbidden by the statute, and were hence void. The court was, doubtless, inclined to the view that this latter contention, if it could be considered unembarrassed by previous decisions, must be sustained, but said: "The appeal is supported by very elaborate and forcible briefs, which if the questions were open for consideration, would challenge and receive serious and careful examination, but we do not think the matter can now be considered open for discussion. Our own records will disclose the fact that trust deeds have been quite frequently used as security for loans. Their validity has been upheld in numerous cases, beginning very soon after the adoption of the code and continuing until the present time: *Bateman v. Burr*, 57 Cal. 480; *Durkin v. Burr*, 60 Cal. 360; *Carey v. Brown*, 62 Cal. 373; *Savings etc. Soc. v. Deering*, 66 Cal. 281; *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128; *Savings etc. Soc. v. Burnett*, 106 Cal. 528. These decisions, which have been uniform, establish a conclusion which has become a rule of property, and however thoroughly we might now be convinced that the rule is erroneous, it should not be disturbed. Doubtless many people have invested their money, relying upon this construction of the law by the highest tribunal of the state, while those who have executed such deeds have done so with the expectation that they would be held valid. Ruin and injustice would result from such a decision as is now sought. If the question as to whether the rule of stare decisis shall prevail be one of policy, there is here no balancing of the evil done against a good attained. The result would be evil only. It is said that in none of the cases heretofore decided was the point raised. Whether it was or not may be a matter of argument. In *Bateman v. Burr*, 57 Cal. 480, it was contended that the deed did not pass the legal title, and that the trustees, not being the owners of the fee, could not sell as provided in the trust deed. True, the argument urged was that the deed,

having been given as security for a debt, was a mortgage only, and therefore did not carry the fee. This was an argument merely. The question was whether the instrument was operative as a deed. If void, it certainly did not confer power upon the trustees to sell. It was decided that it did confer such power": *Sacramento Bank v. Alcorn*, 121 Cal. 379, 382.

The Perpetuation of Legal Error.—If judges were all able, conscientious, and infallible; if judicial decisions were never made except upon mature deliberation, and always based upon a perfect view of the legal principles relevant to the question in hand, and if changing circumstances and conditions did not so often render necessary the abandonment of legal principles which were quite unexceptionable when enunciated, the maxim *stare decisis* would admit of few exceptions. But the strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error. It is true that long acquiescence in an erroneous decision, so that it has become a rule of property or practice, may raise it to the dignity of law: *Ocean Beach Assn. v. Brinley*, 34 N. J. Eq. 438; *Davidson v. Biggs*, 61 Iowa, 309; *Van Loon v. Lyon*, 4 Daly, 149. Yet even in such a case courts will depart from the rule of *stare decisis* for the purpose of rectifying palpable or glaring error, or for most cogent reasons: *Lindsay v. Lindsay*, 47 Ind. 283; *Boon v. Bowers*, 30 Miss. 246, 64 Ala. Dec. 159; *Reed v. Ownby*, 44 Mo. 204; *Kearney v. Buttles*, 1 Ohio St. 362; *State v. Thompson*, 10 La. Ann. 122; *Weaver v. Gardner*, 14 Kan. 347. This statement applies as well to decisions construing statutes as constitutional provisions: *Hart v. Floyd*, 54 Ala. 34.

While expressly adhering to the maxim, *stare decisis*, stated abstractly, it is plain from the cases that courts shrink from confirming their previous errors, and therefore departures from the maxim are very common. If a court hesitates to directly overrule a previous decision which is false in legal theory, it will at least circumscribe its application within as narrow limits as possible: *Judson v. Gray*, 11 N. Y. 408.

It must not be forgotten that a departure from the rule of *stare decisis* can be justified only upon substantial grounds: *McCormick v. Bauer*, 122 Ill. 573. Neither justice nor wisdom requires a court to go from one doubtful rule to another: *State v. Silvers*, 82 Iowa, 714. It is scarcely sufficient reason for overturning a rule of law, well settled and apparently salutary in operation, merely because the reasons given for its original adoption are not altogether satisfactory, and strict logical reasoning might have led the court originally to have adopted a different rule: *Jansen v. Atchison*, 16 Kan. 358; *Davis v. Holberg*, 59 Miss. 362; *Lombard v. Lombard*, 57 Miss. 171. According to Willard, C. J., in *State v. Williams*, 13 S. C. 546: "There are three elements that enter into the authority of a case claiming to stand as a leading case on the general principles of the law: 1. The unanimity with which its judgment was pronounced; 2. The fact that it has been followed; and 3. The duration of the time during which it has been openly followed or tacitly assented

to." Where the error of a previous decision is recognized, but the rules therein announced have become rules of property, the question as to whether or not the rule of stare decisis shall be adhered to becomes a simple choice between relative evils. The rule should be adhered to unless it appears that the evil resulting from the principle established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications upon the subject: *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Pittelkow v. Milwaukee*, 94 Wis. 651; *Kneeland v. Milwaukee*, 15 Wis. (*454), 497; *Board of Commrs. v. Allman*, 142 Ind. 573; *Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575; *Sydnor v. Gascoigne*, 11 Tex. 449.

If a decision of a court is radically unsound, and subserves no useful purpose, but, on the contrary, establishes a hardship which is not within the manifest contemplation of the law, and, moreover, if no injurious results will be likely to follow a reversal, a plain case is afforded for a refusal to adhere to the doctrine of stare decisis: *Kelly v. Rhoads* (Wyo., Jan. 1898); *Linn v. Minor*, 4 Nev. 462. It is the manifest policy of our courts to hold the doctrine of stare decisis subordinate to legal reason and justice, and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error: *McFarland v. Pico*, 8 Cal. 631; *Ellison v. Georgia R. R. etc. Co.*, 87 Ga. 691; *Paul v. Davis*, 100 Ind. 422; *Jasper County Commrs. v. Allman*, 142 Ind. 573; *Smith v. Henry*, 2 Eng. 207, 44 Am. Dec. 540; *Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575; *State v. Clark*, 9 Or. 466; *McDowell v. Oyer*, 21 Pa. St. 417; *Whittemore v. Cope*, 11 Utah, 344.

It has been well said that the law is a science of principles, and that this cannot be true if a departure from principle can be perpetuated by a persistence in error: *Paul v. Davis*, 100 Ind. 422, 427. In this connection the words of Bleckley, C. J., in *Ellison v. Georgia R. R. etc. Co.*, 87 Ga. 691, warrant by their excellence their quotation in full: "Some courts live by correcting the errors of others and adhering to their own. On these terms courts of final review hold their existence, or those of them which are strictly and exclusively courts of review, without any original jurisdiction, and with no direct function but to find fault or see that none can be found. With these exalted tribunals who live only to judge the judges, the rule of stare decisis is not only a canon of the public good, but a law of self-preservation. At the peril of their lives they must discover error abroad, and be discreetly blind to its commission at home. Were they as ready to correct themselves as others, they could no longer speak as absolute oracles of legal truth; the reason for their existence would disappear, and their destruction would speedily supervene. Nevertheless, without serious detriment to the public or peril to themselves, they can, and do, admit now and then, with cautious reserve, that they have made a mistake. Their rigid dogma of infallibility allows of this much relaxation in favor of truth unwittingly forsaken. Indeed, reversion to truth in some rare in-

stances is highly necessary to their permanent well-being. Though it is a temporary degradation from the type of judicial perfection, it has to be endured to keep the type itself respectable. Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not *stare decisis*, but *flat justitia ruat caelum*."

Force of a Single Erroneous Decision.—The holding of the principal case that where a decision contravenes a plain principle of law, or misunderstands or misapplies the law, and a reversal will not disturb property rights already acquired, or make innovations on established commercial usages, it may then become the duty of the judges to reverse such decision, it is plain from the foregoing, is supported by abundant authority: *Truxton v. Fait etc. Co.*, 1 *Pennewill* (Del.), 483; ante, p. 81; *Rumsey v. New York etc. Ry. Co.*, 133 *N. Y.* 79, 28 *Am. St. Rep.* 600; *State v. Hill*, 47 *Neb.* 456, 539. A set of decisions is, of course, much less assailable than a single decision: *Griffin v. Creditors*, 6 *Rob.* 225. Yet it is held that an erroneous decision is not strengthened by being followed perfunctorily and without reasoning: *State v. Williams*, 13 *S. C.* 546. A solitary decision of recent date has never been held to change the law: *Frink v. Darst*, 14 *Ill.* 304, 58 *Am. Dec.* 575. It is well settled that a court is not bound under the rule of *stare decisis* to adhere to a solitary erroneous decision which has not become a rule of practice or property: *Lagrange v. Barre*, 11 *Rob.* 302; *Pratt v. Brown*, 3 *Wis.* (*603), 532; *Evansville v. Senhenn*, 151 *Ind.* 42, 68 *Am. St. Rep.* 218; *Newberry v. Blatchford*, 106 *Ill.* 584; *Montgomery Co. Fiscal Court v. Trimble* (Ky., Nov. 1898); *Gwin v. McCarroll*, 1 *Smedes & M.* 351; *Callender v. Keystone Mut. Life Ins. Co.*, 23 *Pa. St.* 471. In the case last cited the court, per Lowrie, J., discussed the doctrine of *stare decisis* with much ability and appreciation, saying in conclusion: "The doctrine of *stare decisis* is, indeed, one of the most important in the law; for in its simplicity it expresses man's reverence for civil authority, and the demand of his nature that it shall be obeyed—and this feeling is the surest foundation of social order. It is the expression of the people's expectation that all government shall be administered with great care and with a reasonable degree of consistency, and of their confidence that it is so; and it involves the injunction that official functionaries shall not for light reasons abandon the expressed judgments of themselves or of their predecessors, especially if any serious embarrassment of public order may be the consequence. It regards all governmental, and especially judicial decisions, as the official representations of the public will in relation to civil rights and duties, and as being entitled to respect and reverence for this simple reason. To these feelings and

principles we owe official reverence, and we desire to cherish it as a necessary element of social order and of judicial character. We do not violate it when we declare that a decision made four years ago in opposition to all previous legislation and jurisprudence is open to correction."

The rule of stare decisis will not protect from reversal a single erroneous decision which contravenes a settled principle of commercial law: *Aud v. Magruder*, 10 Cal. 282; or which is made without notice of a statute which it in fact sets aside: *Duff v. Fisher*, 15 Cal. 375. Where there has been but a single decision which is clearly erroneous, and important private or public rights are concerned, or where the questionable matter was not necessarily involved in the case, or where the points involved were decided contrary to the well-established legal principles which ought to have governed, and injustice or hardship would result, or where it appears that the facts which impelled the former decision, and the conditions under which they were made were materially different from those in the case under consideration, or where it is manifest that the law has been erroneously decided, and no material property rights or business rules have been established thereunder, the doctrine of stare decisis should not be applied so as to prevent a reconsideration of the former decision: *Kimball v. Grantsville* (Utah, April, 1899). Neither should it be applied to protect a decision upon a question of jurisdiction, where it plainly appears that the decision was founded upon a mistaken reading of a statute: *Romaine v. Kinshimer*, 2 Hilt. 519. The doctrine does not require a court to affirm a clearly erroneous decision which held a statute to be unconstitutional: *State v. Aiken*, 42 S. C. 222; nor to extend any decision upon a constitutional question if it is convinced that error in principle might supervene: *Pollock v. Farmers' Loan etc. Co.*, 157 U. S. 429, 576. Where a decision of a court is considered to be antagonistic to the constitution of the state, as where it subjects homesteads to forced sale in violation of the constitution, the maxim of stare decisis cannot be invoked to sustain it: *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770; *Storrie v. Cortes*, 90 Tex. 283. It is held in *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, that even if property rights have grown up under an erroneous decision with regard to the construction of a clause in the constitution, it is better that inconvenience should be submitted to, rather than that such decision should stand, and a valuable provision in the fundamental law be obliterated.

Force of Decisions by Divided Courts.—An important element that enters into the authority of a decision is the unanimity with which it was pronounced: *State v. Williams*, 13 S. C. 546. In *Lombard v. Lombard*, 57 Miss. 171, the court was asked to overrule one of its former decisions in which only a bare majority of the judges had concurred. Said Chief Justice George: "How much a division among the judges shall detract from the force and authority of the decision as a precedent, it is difficult to define. That a subsequent full bench, all concurring in the impropriety of the first ruling,

would depart from it with less hesitancy in cases where a departure is allowable than they would overrule a unanimous decision, is probable. But this does not help the difficulty here; for, if the former decision be overruled, it will be by a majority only, one judge being thoroughly convinced that it is correct. And so, if a ruling by a majority is not to be regarded as settling the law, the overruling of that decision by a mere majority will leave the law in that state of doubt and uncertainty which is worse than a concededly wrong settlement of it." The former decision was therefore followed.

A judgment concurred in by three judges of a court of five, where one of the concurring judges did not decide upon the same grounds as the other two, is not authority upon points in which the three did not concur. Such matters are not saved from later consideration by the doctrine of stare decisis: *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750. A solitary decision which has not been followed and was made by the concurrence of a bare majority of the court, and which places a palpably erroneous construction upon a statute, is not sacred from reversal under the rule of stare decisis: *Postal Tel. Co. v. Farmville etc. Ry. Co.*, 96 Va. 661; *Hopkins v. McCann*, 19 Ill. 113. The judgment of an equally divided court upon a question cannot be considered a precedent, but the question must be regarded as entirely open: *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103. And it is held that the decree of a lower court, affirmed on appeal by a divided court, is not a decree or judgment of the appellate court in support of which the rule of stare decisis can be successfully invoked: *Griel's Estate*, 171 Pa. St. 412. In *Boyle v. Zacharie*, 6 Pet. 348, it was held that the opinion of Mr. Justice Johnson in *Ogden v. Saunders*, 12 Wheat. 213, being concurred in by the judges who were in the minority upon the general question of the constitutionality of state insolvent laws, was the opinion of the judges who assented to the judgment, and, therefore, that whatever principles are established in that opinion are the settled law of the court, no longer open to controversy.

Conclusion.—The nature of the subject we have been considering has proven such as to render the formulation of general propositions impossible, except to a very limited extent. In determining whether or not a departure from the rule of stare decisis is demanded, courts are invested with an extensive discretion, in the exercise of which they are largely governed by the exigencies of the particular case in hand. In general, the maxim stare decisis, as interpreted by our courts, means no more than that those matters which have been properly decided shall not thereafter be differently decided. This statement does not, of course, apply to the myriad matters which, having no important legal principles as their basis, may, with almost equal propriety, be decided one way or the other, the more important consideration being that they shall be governed by fixed and constant rules of law. As to such matters, the literal mandate of the maxim may be carried out with almost theoretical perfection. But it must happen rarely indeed that the maxim will be used to justify the perpetuation of serious legal error. If this were not

true, our law would lose its necessary flexibility and a hide-bound system of jurisprudence would be the result. There would be introduced into it a canon of development commensurate in its absurdity with that ancient maxim of monarchical rule: "The king can do no wrong"; and the outcome, involving by necessity the sanctification of error and the perpetuation of mischievous mistake, might be serious indeed.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

EVERETT v. SPARKS.

[107 GEORGIA, 48.]

JUDGMENTS—ENFORCEMENT OF BY PUNISHMENT FOR CONTEMPT.—Judgments rendered by the court of ordinary against executors or administrators on citations to account to heirs involving mere money liabilities or indebtedness to them, and not any specific fund, are enforceable only by execution against property, and not by attachment against the person for contempt.

A. C. Riley and M. G. Bayne, for the plaintiffs.

Bacon, Miller & Bumson, for the defendant.

48 LUMPKIN, P. J. The ordinary of Houston county, at the instance of Fannie Everett and others, heirs at law of J. J. Everett, deceased, issued a citation against O. G. Sparks, administrator, requiring him to appear and submit to a settlement of his accounts. He made no appearance; and the ordinary, after an examination of the administrator's returns and making a calculation thereon, rendered a judgment in favor of the plaintiffs, specifying therein that each was entitled to recover of the defendant an amount stated, and reciting "that said administrator has in his hands and is now due the heirs of said estate the sum of four hundred and fifty-one dollars and ninety-three cents." Subsequently, the plaintiffs instituted in the court of ordinary an attachment proceeding, wherein they prayed that, in default of his paying over to them the above-mentioned sum, the administrator be imprisoned as for a contempt of court. This latter case went by appeal to the superior

court, and there, on motion of counsel for the administrator, ⁴⁰ the proceeding was dismissed, on the ground that he was not subject to an attachment for contempt nor liable to be imprisoned for failing to pay the judgment rendered against him in the court of ordinary.

We think the court below was right in dismissing the proceeding. We do not understand from the record that the administrator was adjudged to have in his hands the actual money which he received in his representative capacity. All of the money with which he was chargeable was received by him in 1895, and the citation was not issued until October, 1897. It was therefore to be expected that the money assets of the estate were to be used, loaned out, or invested by the administrator, and not kept idle or in his actual custody. Properly construed, then, the judgment rendered by the court of ordinary, although it recited that the administrator had "in his hands" a specified sum of money, was no more than an adjudication that he was indebted in this amount to the heirs of his intestate. The case is very similar to that of *Wood v. Wood*, 84 Ga. 102, and also to the case therein cited of *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 441. In the former, Chief Justice Bleckley said: "Since the abolition of imprisonment for debt by the constitutions of 1868 and 1877, we think the sounder and better construction of section 2599 of the code [section 3494 of the Civil Code], touching the enforcement of judgments rendered by the ordinary against executors and administrators on citations to account, is that mere money liabilities, where no specific fund is involved, are enforceable only by execution against the property, and not by attachment against the person."

Judgment affirmed.

All the justices concurring.

DECREE—ENFORCEMENT OF BY PUNISHMENT FOR CONTEMPT.—Enforcement of a decree against an executor for a specific sum of money cannot be by process of contempt, but only by execution against property as at law: *Clements v. Tillman*, 79 Ga. 451, 11 Am. St. Rep. 441.

WEGMAN PIANO COMPANY v. IRVINE.

[107 GEORGIA, 65.]

HOMESTEADS—JUDGMENT AGAINST BINDS BENEFICIARIES.—A homestead is in the nature of a trust estate, of which the head of the family is a trustee; and a judgment in a suit brought against him as the head of the family, to subject the homestead to the payment of a debt belonging to the class for the payment of which the homestead can be rendered liable, is binding upon the homestead beneficiaries, although they are not parties to the action.

HOMESTEADS—JUDGMENT AGAINST—BINDING EFFECT ON BENEFICIARIES.—The head of a family holding a homestead is the representative of the beneficiaries thereof, and a valid judgment against him in a suit relating to the homestead, binds the beneficiaries as well as himself, and is conclusive as to all of them.

Dasher, Park & Gerdine, for the plaintiff in error.

H. F. Strohecker, for the defendant in error.

⁶⁵ COBB, J. The Wegman Piano Company brought suit in the city court of Macon against E. D. Irvine, alleging in its petition that on the fifteenth day of October, 1883, Irvine had set apart to him, as the head of a family consisting of his mother and infant brother, an exemption of personalty; that the proceeds arising from a sale of the exempted property were invested by Irvine as head of a family in a certain stock of ⁶⁶ pianos, organs, and other musical instruments and supplies; that he carries on a mercantile business with the stock of goods so purchased and added to from time to time under the name of "The Georgia Music House, E. D. Irvine, Agt."; that in the course of business he became indebted to petitioner in the sum of four hundred and thirty-seven dollars and eleven cents, besides interest, evidenced by eight promissory notes signed by E. D. Irvine, agent; that the notes were given for the purchase of a number of pianos from petitioner, which were disposed of by Irvine in due course of business; that repeated demands have been made upon Irvine, as the head of a family, to pay the indebtedness, but he refuses to pay the same; and that he is insolvent. The prayer of the petition was, that the exempted property might be subjected to the payment of the indebtedness due petitioner. No defense having been filed to this suit, judgment was rendered against the defendant as "the head of a family" for the amount sued for, it being declared therein "that the homestead estate" was liable for the debt sued on, and that the judgment was "a lien upon the stock of pianos, organs, and

musical goods in the stock of the 'Georgia Music House,' E. D. Irvine, Agt., said stock being the property claimed by said E. D. Irvine as a head of a family under an exemption of personalty." The judgment concluded with these words: "The sums for which judgment are hereby given to be levied of said above-described exempt property. This March 6, 1897." Upon this judgment a fieri facias was issued against "E. D. Irvine, head of a family," and was directed to be levied especially of "the stock of pianos, organs, and musical goods in the stock of the Georgia Music House, E. D. Irvine, Agt." On June 11, 1898, the defendant made a motion to set aside the judgment, upon the following grounds: "1. Because the pleadings do not make out such a case as would authorize the court to render the judgment had; 2. Because the judgment finds the homestead subject to the debt, and makes the judgment a lien on the homestead, when the pleadings show that the debt sued on was not such a debt as the homestead was liable for, under the constitution and laws of Georgia; 3. Because the pleadings do not show that the money arising from the sale of the articles bought from plaintiffs, ⁶⁷ and for which the notes sued on were given, ever went into the homestead property or became a part of the homestead, and was at the time of the suit a part of the homestead or had in any way actually benefited the homestead estate; 4. Because there is no way by which the homestead estate can be subjected by common law or statute law proceedings to any debt contracted by the head of a family; 5. Because the declaration in the suit wherein the judgment complained of was rendered failed to set out the beneficiaries of the homestead; at the time of said suit said movant having a wife and three minor children who are beneficiaries." On June 18, 1898, after notice to the plaintiff and a hearing on the motion, the same was overruled. No exception was taken to the order overruling this motion. On August 1, 1898, Sallie C. Irvine, in behalf of herself and her minor children, presented a petition to the judge of the superior court, in substance alleging: Petitioner is the wife of E. D. Irvine, having intermarried with him on January 10, 1887, and there are now living five minor children as the issue of this marriage. The petition alleges the facts which have been hereinbefore set out, as to the exemption having been set apart to her husband as the head of a family consisting of his mother and infant brother, as to the suit by the Wegman Piano Company, and the result of that suit. It is alleged that petitioner and her children are the beneficiaries of the home-

stead estate; and that the execution issued in the suit in the city court above referred to has been levied upon the homestead estate, and the same will be sold unless the sale is enjoined by the court. Also, that the declaration in the suit against E. D. Irvine, agent, does not make out a case wherein the homestead estate is liable; that it fails to set out the names of the cestuis que trust, and fails to describe any specific property which is liable for the debt sued on; and that the court rendering the judgment was without jurisdiction. It is further alleged that two of the notes sued on had been paid before suit was brought, but never surrendered, and that all of the judgment and execution, except about fifteen dollars, and the amount of the two notes above alluded to, has been paid by Irvine since the judgment. Waiving discovery, petitioner ⁶⁸ prays that the execution be perpetually enjoined from proceeding against the homestead estate; that the judgment be declared null and void; and that the execution be credited with the amount of the two notes paid before the suit was brought and wrongfully included in said suit. To this petition the defendant filed a demurrer and an answer. Upon the hearing the judge enjoined the execution from proceeding against the homestead property. To this ruling the Wegman Piano Company excepted.

The suit by the Wegman Piano Company against Irvine was an effort to render the homestead estate liable for a debt on which, it was claimed in the petition, the law authorized a judgment condemning the homestead property. It was evidently the intention of the pleader to bring a suit under the provisions of section 3202 et seq. of the Civil Code, declaring the way in which suits against trust estates should be brought. The failure to set out the names of all the beneficiaries, and the informal way in which the property of the homestead estate was described, are defects which would be amendable before, and which would be cured by, a judgment in the case: Civ. Code, sec. 5365; *Artope v. Barker*, 74 Ga. 462. Especially is this true where the judgment sets up a special lien upon the property and the same is described therein with sufficient certainty to enable the levying officer to locate and seize it. When judgment was rendered in the case, the court had before it a petition alleging that there was a homestead estate, some of the beneficiaries being named, and a claim that under the law the homestead estate could be charged with the payment of plaintiff's debt. In order for the court to render a judgment in favor of the plaintiff in such a case, it was necessary that it

should decide, not only that there was a homestead estate, but that the debt of the plaintiff belonged to that class of debts which the law authorized to be enforced by judgment against estates of this character. Such being the case, if the court had before it a person authorized by law to represent the homestead estate, the judgment would be conclusive upon all questions which were necessarily to be determined in order to render the judgment. Irvine, the head of the family, had an opportunity ⁶⁹ to be heard before the judgment was rendered. He has been heard since the judgment was rendered, on a motion to set the same aside. The question presented is, whether the beneficiaries of the homestead can be heard now to impeach this judgment which was rendered against the head of the family of which they are members, and who was the owner of the property out of which the homestead estate was carved. If Irvine represented the beneficiaries, the judgment is binding upon them. If he did not, the levy of the execution upon the homestead was properly enjoined. In the case of *Willingham v. Maynard*, 59 Ga. 330, it was held that: "The title to land set apart as a homestead is for the use and benefit of the family, and is in the nature of a trust estate, the mere legal title being in the head of the family as trustee or agent." In the case of *Shattles v. Melton*, 65 Ga. 464, it was held that the head of a family was a proper party to sue for the recovery of a homestead under the act of 1876, and that a bill filed in the name of the beneficiaries, which failed to allege any reason why the head of the family was not a party complainant, was demurrable. In the case of *Brady v. Brady*, 67 Ga. 368, it was held that it was more regular for the husband, as the head of the family, to interpose a claim to a levy on the homestead seeking to subject the same to his debt, but that the wife had such an interest that a claim by her would not be dismissed. In *Barfield v. Jefferson*, 84 Ga. 609, it was ruled that, "where land was sold in April, 1883, and in the next December the vendor, as head of a family, applied for and had set apart to him a homestead therein, and in 1885 the vendee brought complaint for the land, which action was defended by the vendor with pleas of not guilty and usury in his deed, he represented not only his own interest in the legal title, but also that of his family in the use, and the judgment rendered bound his family as well as himself." Justice *Simmons* in the opinion uses this language: "*Barfield* sold the land to *Jefferson* in April, 1883, and the homestead was granted to him as head of a family in December, 1883. In 1885 *Jefferson*

brought his action against Barfield to recover the land, and succeeded. At the time this action was commenced, and during its pendency, if Barfield's ⁷⁰ homestead was valid, he held the land as head of his family and represented them. If the homestead was valid, the legal title was in Barfield and the use in his family, and when the ejectment was brought against him to recover the land, and he defended the same by filing his pleas, he represented not only his interest in the legal title to the land, but the interest of his family in the use thereof; and the judgment against him in that suit was, in our opinion, under the facts of this case, not only binding upon him, but binding upon his family also. His family claimed under him, and judgments bind not only parties to the suit, but all who claim under them." These authorities show that the law of this state recognizes the head of a family as the representative of the beneficiaries; and when a judgment is rendered against him in a suit relating to the homestead property, if he is bound, the beneficiaries are also bound. As Irvine is undoubtedly bound by the judgment rendered in the original suit, as well as by the judgment rendered in the motion to set it aside, his wife and minor children, if they are beneficiaries of this homestead, are alike concluded, and the injunction should not have been granted at their instance. See in this connection *Sanders v. Houston Guano etc. Co.*, 107 Ga. 50. Whether the wife and children of Irvine are beneficiaries of the homestead set apart to him as the head of a family, consisting of his mother and infant brother, is not necessary to be decided, under the view we take of the present case; but see in this connection *Dismuke v. Eady*, 80 Ga. 289.

Judgment reversed.

All the justices concurring.

HOMESTEADS—FOR WHAT CLAIMS LIABLE.—In a majority of the states a judgment or execution lien does not attach to a homestead: Note to *Simpson v. Houston*, 2 Am. St. Rep. 299. Yet under many statutory and constitutional provisions of the several states, homesteads may be subjected to various claims: See extended note to *Mertz v. Berry*, 45 Am. St. Rep. 383-389.

AM. ST. REP., VOL. LXXIII.—8

HOLLIS v. LAWTON.

[107 GEORGIA, 102.]

TRUSTS IN FAVOR OF CHILDREN—WHO INCLUDED.—
A trust deed of land to one as trustee for "his wife and the children, issue of their marriage," includes as beneficiaries of the trust the wife and only such issue as are in life at the time of the execution of the trust deed, and not those born thereafter. The trust becomes executed, and the legal title to the property vests in the beneficiaries, when the youngest thereof reaches the age of majority, and suit cannot be thereafter maintained by the wife and all of her children, including those born after the execution of such deed, to set aside, on the ground of fraud, a sale and conveyance of the property made by the trustee after the trust has become executed, and to re-establish the trust in favor of the wife and all of her children.

Preston & Ayer, R. C. Jordan, and Hall & Hardeman, for the plaintiffs.

Guerry & Hall, Hardeman, Davis & Turner, Estes & Jones, and J. L. Lawton, for the defendants.

103 LEWIS, J. At the April term, 1898, of Bibb superior court, there was tried the case of Mariah A. Hollis and her children, five of whom were minors suing by their next friend, against Carrie W. Lawton and Jere Hollis, Sr., alleged to be the trustee of the plaintiffs. It appeared from the petition, that on the twenty-ninth day of December, 1873, Leonard Y. Gibbs conveyed by deed to "Jere Hollis, trustee of his wife Mariah A. Hollis, and the children issue of their marriage," a certain tract of land. This land, including some smaller tracts, which it seems had been exchanged for certain small portions of the original tract, was conveyed in a deed from Jere Hollis, as trustee for his wife and children, to R. F. Lawton, on April 11, 1887, in consideration of the sum of nine thousand five hundred dollars. R. F. Lawton died, and on March 12, 1892, his will was admitted to probate, in which he bequeathed and devised to his wife, Carrie W. Lawton, all of his property. Under that will she passed into possession of the premises in dispute, as sole devisee of her husband. It was alleged in the petition that the sale by Hollis, trustee, to Lawton, was made for the purpose of paying the individual debt due by the trustee to Lawton, for which the estate was in nowise liable, and also for the purpose of paying other individual indebtedness of Jere Hollis; that Lawton knew of such purpose, applied a large portion of the money to his individual debt, and colluded with Hollis in the misappropriation of a portion of the other pro-

ceeds of the sale, in ¹⁰⁴ the payment of Hollis' individual debts. It appears, however, that a part of the proceeds of the sale, to wit, about two thousand five hundred dollars, was invested in other lands for the benefit of the wife and children; and the plaintiff offered to do equity as to that amount, by allowing it as a charge on the premises in dispute. The purposes of the petition, as amended, were to have the sale of Hollis, trustee, to Lawton set aside as fraudulent; to recover of Carrie W. Lawton the trust property conveyed by said sale; to re-establish the trust thereon; to remove Jere Hollis, trustee, from his office, for mismanagement and waste of the trust estate, and to have appointed in his stead one of the plaintiffs as trustee to take charge of and manage the estate for the beneficiaries. It further appeared that all the children who were in life at the time of the conveyance from Gibbs to Jere Hollis, trustee, were of age or had passed the age of majority, when Hollis, trustee, conveyed the property to Lawton, on April 11, 1887. The petition was brought against the trustee, Jere Hollis, and Carrie W. Lawton, sole devisee under the will of her husband. To the petition and the amendments thereto the defendants filed a demurrer upon several grounds; among others, on the ground that the five minors who were made parties plaintiff were not proper parties in the case, because the deed set out as an exhibit to the petition, by virtue of which they claim an interest in the land in dispute, conveyed to them no title to, or interest in, the property. There was also a special ground of demurrer to so much of the petition as prays for some other person to be appointed in the place and stead of Jere Hollis, on the ground that said trust is an executed trust and no trustee is needed in the place of the said Jere Hollis. The demurrer was overruled on all the grounds, to which judgment defendants filed exceptions pendente lite. After the plaintiffs had closed their testimony the court, upon motion of defendants' counsel, awarded a nonsuit, to which judgment, and various rulings of the court in the progress of the trial, plaintiffs assigned error in their bill of exceptions. Defendants likewise assigned error, in their cross-bill of exceptions, on the judgment overruling their demurrer, to which judgment exceptions pendente lite were filed.

¹⁰⁵ 1. The vital question that meets us at the threshold of this case arises on the cross-bill, and is whether or not the words of the deed from Gibbs to Hollis, trustee, executed in 1873, included only such issue of the marriage between himself and his wife as were in life at the time the conveyance was made;

or whether it also included children that might be born to them thereafter. We therefore deal first with this question: See *Cheshire v. Williams*, 101 Ga. 814; *Gay v. Gay*, 108 Ga. 739. If it included only the children then in life, it is conceded that the trust was executed prior to the conveyance made by Hollis, trustee, to Lawton; that the title had before then vested in the beneficiaries; and that therefore this action could not be maintained. On the other hand, if the original trust deed by its terms included not only the living but after-born children, the trust is still of an executory nature, five of these children still being minors, and the legal title to whatever trust estate remains is in the trustee. After a consideration of several cases decided by this court, bearing upon this subject, we have reached the conclusion that the words of the trust deed of 1873 do not include any children then not in esse. In the case of *Loyless v. Blackshear*, 43 Ga. 327, it was decided that under a deed conveying land to one in trust for M. and her children, M. and her children then in life took an estate in the land as tenants in common. In *Gillespie v. Shuman*, 62 Ga. 253, it was held that a devise to a woman and her children, if any living, means to her and such children as may be living at the death of the testator; if none be living, she takes a fee simple estate, and the birth of children subsequently to the death of the testator cannot affect the estate conveyed. In the case of *Estill v. Beers*, 82 Ga. 608, it appears there was a conveyance in trust for the benefit of a certain person and her three daughters (naming them), and it was provided that the portions devised to the sisters were to be settled severally and separately upon each of them, but for the sole use, benefit, and advantage of each of these sisters and their child or children. One of the sisters had a child at the time of the conveyance, and the others none. It was decided by this court that the deed passed an estate in common to this daughter and her child and the sole estate in fee to each of the ¹⁰⁶ other daughters. In the case of *Baird v. Brookin*, 86 Ga. 709, it was held, under a deed to A as trustee for B and her children, B having at the time of its execution no children, that the children of B born subsequently to the execution of the deed, took no interest thereunder. See, also, *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439, where it is decided, a deed from A to the heirs of B passed the title to the children then in life, and no title to children after-born. The principle upon which these decisions are based is, that when property is conveyed to one and his child or children, without

naming the children and without giving any other designation as to what particular children are contemplated, it necessarily refers only to such as are in life at the time the instrument of conveyance goes into effect. So rigidly has this rule been adhered to, that, in the case last cited, the words of the conveyance being to B and her children, after-born children took no interest in the property, although B had no children at the time of the execution of the deed. The argument might have been, and doubtless was, urged with force in that case, that the grantor must necessarily have contemplated and intended to include in the conveyance children subsequently born, for the simple reason that any other construction would have made the word "children" meaningless at the time it was used; but so rigidly was the rule enforced that this court adhered to the letter of the deed and decided that B took an absolute fee simple estate in the property. The rule, then, governing the construction of such words in a deed or will is, that the intention of the maker of the instrument will be construed to refer only to such persons as are in life, unless there are some words or expressions in the instrument indicating a contrary intention and showing that the maker also had in mind a certain person, or class of persons, that might thereafter be born.

Upon a careful examination of the decisions of this court, relied upon by counsel for plaintiffs, we think it will be seen from the peculiar facts in each case that none are in point. In the case of *Vinson v. Vinson*, 33 Ga. 454, it appeared that the testator devised certain property "to the heirs in law" of one of his sons, and made that son trustee of the property so bequeathed. ¹⁰⁷ It was held that the son held the property in trust for all who might answer the description of his heirs in law, at the time of his death, then to be distributed; and the reason for that decision, as expressed by Lumpkin, chief justice, on page 457, was that the testator looked to the death of his son as fixing the period when the legatees should be ascertained. In the case of *Gaboury v. McGovern*, 74 Ga. 133, a bequest was made to a daughter for the use of herself and her lawful issue during her life. It was held that this created an estate subject to be opened upon the birth of a child to her, and to let in such child as a beneficiary with the mother during her life. It will be seen, however, by reference to the contents of the will that was under consideration in that case, the language of the bequest was modified by superadded words in the will, giving other direction with reference to a disposition of the property in the

event of the death of the testator's daughter without child or children or the issue thereof surviving her; and accordingly in the opinion in that case, on page 143, it was argued that by these superadded words, "lawful issue," the testator meant such child or children of his daughter as she might have living at her death, and not an indefinite line of descendants. Again, in the case of *Toole v. Perry*, 80 Ga. 681, the will directed that all the property devised to the testator's daughters and children should be free from the debts and liabilities of their present or any future husband, and for their sole and separate use. It was held in that case that the devise was not only for the benefit of such children as were in life at the death of the testator, but also included those afterward born to the daughters. The reasoning of that decision rested upon the superadded words, "free from the control," etc., "of their present or any future husbands"; and Justice Blandford in his opinion, on page 682, argues that from these words it was to be inferred the testator had in view the probability naturally flowing from the relation of husband and wife, the testator speaking, not only of the present, but of any future husbands. The distinction between that case and the case of *Baird v. Brookin*, 86 Ga. 709, is clearly shown in the opinion of Justice Lumpkin on page 716 of that case. The deed now under consideration is simply to Jere Hollis, ¹⁰⁸ trustee of his wife, Mariah A. Hollis, and the children, issue of their marriage. Under the uniform rulings of this court, the words, standing alone, refer to the children then in life. The expression "issue of their marriage" can mean nothing more nor less than to designate the particular children of the trustee and his wife, so as not to include any others that might possibly have been the issue of any former marriage. It would have been tantamount to the same thing had the conveyance been to the trustee, for the benefit of his wife and the children of their marriage, there being no superadded words in the conveyance indicating any intention whatever of the grantor to include any persons not in life at the time his conveyance went into effect. Under the uniform rule of construction adopted by this court, as we view its decisions, we conclude that none of the children of this marriage, born after the execution of this deed, have any interest whatever in the property conveyed. It follows, therefore, that the trust was executed before the alleged illegal sale of the property by the trustee, and that on this account the present action cannot be maintained. Hence we think the court erred in overruling the

defendants' demurrer to the plaintiff's petition, but that after this was done the court was right in sustaining the defendants' motion for nonsuit.

The above view of the case renders it entirely unnecessary to consider the questions presented by the main bill of exceptions, or the other questions arising upon assignment of error in the cross-bill of exceptions.

Judgment on cross-bill of exceptions reversed; main bill dismissed.

All concurring, except Simmons, C. J., disqualified.

CHILDREN—WHO INCLUDED IN DEED TO.—A deed to the heirs of A vests an estate in his children then living, to the exclusion of children born subsequently: *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439; and a devise or bequest to children embraces only those children living at the time of the testator's death: *Thompson v. Garwood*, 3 Whart. 287, 31 Am. Dec. 502; *Collin v. Collin*, 1 Barb. Ch. 630, 45 Am. Dec. 420. It must be remembered, however, that an exception to this general rule exists when, by a conveyance or devise, the time of distribution or enjoyment is postponed to some subsequent date. In that event, all the children in being when the time for distribution or enjoyment arrives are included within the benefit of the grant or devise: *Thomas v. Thomas*, 149 Mo. 426, post, p. 405, and note.

HILSON v. KITCHENS.

[107 GEORGIA, 230.]

JUSTICES OF THE PEACE—PLACE OF HOLDING COURT.—A justice of the peace, after giving notice that his court will thereafter be held in a new place in some particular house or definite locality in a certain village, cannot, after holding court there, lawfully hold his court in any other house or locality in that village, without giving further notice of such change, as required by statute.

JUSTICES OF THE PEACE—VOID JUDGMENTS.—A judgment of a justice of the peace is void, when it affirmatively appears therefrom that the court was held at a place where it could not lawfully sit.

K. J. Hawkins, for the plaintiff in error.

E. B. Rogers and J. K. Hines, for the defendant in error.

231 COBB, J. An execution purporting to have been issued from a justice's court was levied upon certain personal property, and the progress of the same was arrested by an affidavit of illegality, alleging that the pretended judgment upon

which the execution was issued was not rendered at a place lawfully appointed for holding justices' courts. The case was carried by appeal to the superior court, and the issue raised upon the affidavit of illegality was submitted to the judge without the intervention of a jury. From the evidence introduced before the judge it appeared that the justice of the peace who issued the execution was elected in 1886, and held his first court in the office of Dr. Scruggs at Scruggsville in the eleven hundred and sixty-ninth district in Glascock county. At the time of holding this court the justice wrote notices and posted them, stating that after publication of such notices for sixty days the place for holding the justice's court within the district would be changed from Scruggsville to Mitchell "at some point near the line" of a named railroad in that town. In pursuance of such notice the place for holding court was changed to Mitchell, and has been since held at that place. At the time of giving notice of the change of place "there was no house in the town of Mitchell" in which to hold court, and the first court was held in a "guano-house, near the railroad track." The court was not always held in the "guano-house," but was held at different places in the town of Mitchell. One or two courts were held in Kitchens Brothers' store, one or two others in Kelley & Snider's store, while still others were held in the depot, Dr. Kitchens' office, and in the store of Daniel Brothers. Several courts were held in the latter place, and the judgment upon which the execution in this case issued was rendered there. There "is yet no house in Mitchell" in which justices' courts can be held without the consent and permission of the owner. The judge "overruled" the affidavit of illegality, and the defendant excepted.

The constitution declares that justices of the peace shall "sit monthly at fixed times and places": Civ. Code, sec. 5856; see, also, sec. 4101. "Justices of the peace have authority, and it is their duty, to select some central and convenient place in their ²³² respective districts at which to hold their courts, of which they shall give ample public notice, and also to keep their offices within said districts": Civ. Code, sec. 4082. The manner of changing the place of holding such courts when a new justice is elected is prescribed in section 4106 of the Civil Code, which is as follows: "When a new justice of the peace is qualified, and he desires to change the place of holding such courts, he may do so by giving public notice of the fact, stating the place to which changed, and the first court to be thus

held, which change shall not go into effect short of sixty days from the time of advertising." It appears from the record in the present case that the lawful place of holding justices' courts in the district in which the plaintiff in error resided was, at the time of the election of the justice of the peace who rendered the judgment and issued the execution, in Scruggsville. He had a perfect right, under the authority of the section of the code above quoted, to change the place of holding court, in the manner therein prescribed. It is not necessary, in the present case, to determine whether the effort to change the place of holding justices' courts in the district was ineffectual because a designated house or other fixed locality in the town of Mitchell was not set forth in the notice. If the place of holding court was by the notice and advertisement legally removed from Scruggsville, such removal was to the house at which the first court was held in Mitchell. This house became the "fixed place" for holding court, and it was not lawful to hold court at any other house without complying with the law requiring public notice of a change of place. As there was no authority for holding court in the town of Mitchell at any other place than the house in which the court was first held, a judgment rendered at any other place is absolutely void: Civ. Code, sec. 4108. The facts of the present case are all that are necessary to show the wisdom of the lawmakers in requiring these courts to be held at "fixed places." The evils and hardships resulting from a migratory court are plainly manifest. No one interested in the cases pending in the justice's court at Mitchell—a village about a mile and a half in diameter—could tell in what house to look for the court which was to pass upon his ²³³ rights; and even the justice himself could not always tell with certainty where he was going to "administer justice."

The judgment attacked in the present case being void, the question could properly be raised by an affidavit of illegality: *Planters' Bank v. Berry*, 91 Ga. 264.

Judgment reversed.

All the justices concurring.

JUSTICES OF THE PEACE—PLACE OF HOLDING COURT.—A justice of the peace loses jurisdiction over a cause where he adjourns it to a time or place uncertain: *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451, and note.

ADAIR v. SOUTHERN MUTUAL INSURANCE CO.

[107 GEORGIA, 297.]

INSURANCE—FIRE—CHANGE IN CONDITIONS OF PREMISES.—A provision in a policy of fire insurance that it shall be forfeited by any change in the use or condition of the insured premises increasing the degree of risk, unless due notice is given to the company and a new agreement is entered into, applies to changes of a permanent nature and not to mere temporary changes in the use of the premises. The mere temporary use of a threshing machine for a few hours on the premises where the insured property is located does not, of itself, work either a forfeiture or suspension of such policy.

INSURANCE—CHANGE IN CONDITION OF PREMISES—NEGLIGENCE.—If a policy of fire insurance provides that it shall be forfeited by any change in the use or condition of the insured premises increasing the risk made, without due notice to the company, and a new agreement entered into, and the insured or one to whom he has intrusted the entire custody and control of the insured property by his negligent acts so changes the use and occupancy of the premises as to temporarily increase the risk without the consent of the company, it is not liable for a loss directly resulting as a consequence of such acts.

INSURANCE—CHANGE IN CONDITION OF PREMISES—NEGLIGENCE—QUESTION FOR JURY.—Under a policy of fire insurance providing that it shall be forfeited by any change in the use or condition of the insured premises increasing the degree of risk, the question whether or not there has been such negligent use of the insured property as to materially increase the risk and thus cause the loss, should be submitted to, and determined by, the jury, when the evidence is such as to raise a serious doubt.

W. R. Hammond, for the plaintiff.

Erwin & Erwin and S. C. Dunlap, for the defendant.

298 LEWIS, J. Suit was brought by Augustus D. Adair, as administrator of the estate of Sarah C. Hudson, deceased, against the Southern Mutual Insurance Company, the same being an action for the recovery of a loss on a policy of fire insurance.

This policy was issued to the plaintiff on the 22d of January, 1897, and "insures estate of Mrs. Sarah C. Hudson against loss or damage by fire to the amount of twelve hundred dollars for the term of one year," one thousand dollars of said sum being on a house that was occupied by the family of the deceased as a dwelling, and the balance on furniture in the house. After plaintiff's evidence had closed, the judge granted a nonsuit on motion of defendant's counsel, upon which error is assigned by the plaintiff in his bill of exceptions. It appears from the record that at the time of the fire the premises were in possession of the husband of deceased, who, with his children, occupied

the dwelling. He had a small quantity of wheat that had been placed on the premises where the dwelling was located, and had procured the owner of a threshing machine run by an engine to move his machine on the premises for the purpose of threshing this wheat. The engine was located about eighty-five feet from the dwelling. It had no spark arrester. The separator was located about half-way between the engine and the house. As the grain was being threshed, the straw gathered near the separator, some of it falling within a few feet of the dwelling. The work of threshing the grain required only about two hours. When it commenced the weather was calm, a gentle breeze blowing from the house toward the engine. Plaintiff's witnesses testified that they regarded the house in no danger from fire with the weather in that condition; that there were a number of workmen engaged about the machinery, some ten or fifteen; and that even if a spark from the engine had ignited the straw, it could readily have been extinguished without material danger to the house. The owner of this machine testified that he had been engaged in such business off and on for ten or fifteen years, using the same character of engine he had then, threshing thousands of bushels of grain often in a season, and he never before this fire knew a pile of straw to catch fire from the engine; that often the engine was stationed ²⁹⁹ near houses, barns, stables, etc., as this one was on the day of this fire, and no loss from fire had ever occurred. Plaintiff testified to the same effect. After the work was about half over there came an unexpected and sudden gust of wind, called by the witnesses a "dry storm," which blew very violently from the engine toward the dwelling. It is described as coming in a whirl, and as being one of the most violent winds plaintiff ever saw, except a cyclone on one occasion. About the same time fire was noticed in the straw. It was presumed it came from a spark from the engine, though the witnesses did not know that as a fact. Strong efforts were at once made to extinguish it, but the wind blew so violently as to carry the straw against the house, fan the flames, and blow them for many feet beyond. This wind blew the belt from the machinery. The efforts to save the house proved fruitless, and it was destroyed.

1. The only portion of the policy sued upon material to be considered in determining the issues involved in this case is the following clause: "Policies shall be forfeited, first by any change in the use or conditions of the building, including additions or repairs, or by the erections of buildings, or in any

other manner by which the degree of risk is increased, unless due notice is given the company, and a new agreement entered into." It is insisted by counsel for defendant in error that the use of these premises, by placing thereon this machinery and using the same in threshing grain, amounted to a forfeiture of the policy, especially as it caused the fire which destroyed the property insured. We do not think, in the first place, that the clause has any reference to such temporary use of the premises, but that it refers to changes in the use or condition of the buildings, or to changes in any other manner of a permanent nature, by which the degree of risk is increased. Where premises are occupied as a home on which is located the dwelling of a family, the use of them is constantly susceptible to changes of a temporary nature for the convenience of the occupants and to facilitate the conduct of business pertaining to the industries of the members of the household. We think it would be going a long way toward construing these policies liberally in favor of insurance companies, as well as liberally in favor of ³⁰⁰ the doctrine of forfeiture, to hold that it was intended by the contract that every such temporary change which may for the moment increase to some degree the risk of fire would necessarily work a forfeiture of the policy at the option of the company. There is no person, perhaps, so diligent as to live from day to day with an equal and uniform degree of caution against accidents of this sort. An important thought to consider in this connection is, that while a permanent use of the premises in a certain manner from day to day might materially increase the hazard from fire, yet a mere temporary use for a few hours, while the occupants are vigilant and on the alert to prevent fire, might not be considered as a material risk at all, although the dwelling may be in a little more danger from fire on such special occasions than is generally the case.

We think our view of the construction that should be given the terms of the clause above quoted is demanded by the well-known elementary principle of law governing the construction of such instruments, namely: 1. They should be construed strictly against the company or party preparing them; and 2. They should be so construed as to avoid, if possible, a forfeiture. We are satisfied that these views are sustained by a decided weight of authorities, some of which we will now briefly allude to, to show the general trend of judicial decisions on this line. In discussing this provision in policies, touching the use and occupancy of premises so as not to increase the

risk from fire, we quote the following from 7 American & English Encyclopedia of Law, first edition, 1035: "The change contemplated by the provision is not a mere temporary or incidental change, but a permanent and substantial change." Quite a large number of authorities are cited to support the text; and in this connection we call attention to instances given on page 1034 of the same volume, which have been held by courts not to constitute a change: "The making of repairs to a dwelling-house; shutting down a factory temporarily; running the engine and certain shafting of a mill or factory at night, when the policy recites, 'run by daylight only'; changing from a dwelling to a boarding-house; changing occupants; mixing and keeping paints in a barn described in the policy as 'used for hay, straw, grain unthreshed, ³⁰¹ stabling and shelter,' while painting the house on the same premises; ceasing to occupy the premises; lighting temporarily with gasoline; mortgaging the property insured." In the case of Westchester Fire Ins. Co. v. Foster, 90 Ill. 121, it was held that: "An occasional occupation of a room of a building insured, by a carpenter in his business, is not such a violation of a clause in a policy, which forbids that during the term of insurance the premises should be used for any trade or business denominated 'hazardous, as will defeat a recovery in case of loss. An occasional day's work by a carpenter in a part of the house will not avoid such a policy." In Loud v. Citizens' Mut. Ins. Co., 2 Gray, 221, it appeared that, by express directions of the assured, a certain stove in the building was not to be used, the same being in an unsafe condition. The owner allowed the house to be occupied temporarily as a shelter for the crew of a vessel, who built a fire in the stove for one night. It was held that such a temporary use did not void the policy. It appeared in that case that the house was actually destroyed as a result of the fire being kindled in the stove. In the case of Williams v. New England etc. Ins. Co., 31 Me. 219, it was decided that a warranty in the insurance of an unfinished dwelling-house, which was in the process of construction, that there were to be no stoves in it, must be understood to mean that no stove is to be habitually kept and used in it as stoves are ordinarily kept in dwelling-houses, and that the use of a stove for a few days for a purpose connected with the finishing of the house is not a violation of the warranty. In Smith v. German Ins. Co., 107 Mich. 270, there was a stipulation in the policy sued on that it should be void "if there be kept, used, or allowed on the above-de-

scribed premises, benzine, naphtha, or other explosive." The court decided in that case that "gasoline is not 'kept, used, or allowed' on the premises insured, within the meaning of a provision for avoiding the policy, by leaving a five-gallon can containing gasoline in the building for a number of days for use in burning off old paint preparatory to repainting the building."

The clause of this policy which we have been construing we do not think amounts to anything more or less than a provision ³⁰² employed in our Civil Code, and it would constitute a part of the contract between the parties whether they made any stipulation in reference thereto or not. Section 2100 of the code declares: "Any change in the property, or the use to which it is applied, without the consent of the insurer, whereby the risk is increased, voids the policy." The case of *Alston v. Greenwich Ins. Co.*, 100 Ga. 282, cited by counsel for defendant in error, we do not think in point. It appeared in that case that the insured had permitted another person to store a large quantity of hay in the storehouse wherein his own goods, covered by the policy, were contained, and it also appeared that the hazard was thereby increased. It was held that a nonsuit was proper, under a provision in the policy that the same should be void if the hazard be increased by any means within the knowledge or control of the insured. But, manifestly, under the facts of that case, the change made in the use of the house was of a permanent nature. The hay was stored in the house for the purpose of making sales thereof, and was as permanently located there as the goods themselves which were insured. If a mere temporary change in the use or occupation of the premises which increases the risk of insurance per se forfeits the policy, then the policy is void whether any loss results from such increased risk or not, and even if the change is removed by the insured and the premises restored to their original condition without any loss occurring to the property, unless, of course, the insurance company, either expressly or by implication, waives its right of forfeiture. Hence, if the use of the premises complained of by the defendant in this case worked a forfeiture of the policy, it would have been void at the option of the company, even if the machinery and inflammable matter had been removed, without having caused injury from fire. Manifestly, we think, it was neither the intention of the provision in the policy above quoted nor of section 2100 of the Civil Code, that this contract of insurance should have such a construction. There is authority, however, to sustain the position

that while a temporary increase of risk could not operate *per se* to forfeit the policy, it would have the effect of suspending it during the existence of such risk: See 3 Joyce on Insurance, sec. 2239, ³⁰³ and authorities cited. There is quite a difference between forfeiture and suspension. In the latter case the policy is simply inoperative during the time of the suspension. Hence, it follows that when the cause of the suspension is removed the policy is revived and continues in force. But not so in case of forfeiture, for the policy would continue absolutely void unless a waiver occurs as above indicated. But even in case of a risk simply suspending a policy, if the loss by fire occurs during the existence of the risk, there is no liability upon the insurer, although the fire was in nowise the result of such increase of risk. To illustrate: If this property had been destroyed by fire during the time of the operation of the machinery materially increasing the risk, then there could be no recovery, though the fire was in nowise the result of such increase of risk, but was owing to some accidental cause entirely unconnected with the change made in the use of the premises. On the other hand, if under the contract neither a forfeiture nor a suspension exist, the company would be liable. But we do not think such a temporary use of the premises even operates to suspend the policy in the sense above indicated. No such construction can be placed on section 2100 of the Civil Code. That refers to such permanent change, as above shown, which "voids the policy," that is, works an absolute forfeiture. The same thing is true of the contract itself. It does provide for a forfeiture on certain conditions, but nowhere for a mere suspension. What power, then, have the courts to interpolate into the agreement between the insurer and the insured a condition or stipulation not contemplated either by the law or by the contract between the parties?

2. But if the loss directly results from a mere temporary and fleeting change in the use or occupation of the property insured or of the premises immediately surrounding it, and a material increase of the hazard of insurance is caused by such use, then there still may be nonliability of the company, not growing out of a suspension of the policy by its terms, but from other principles of law sufficiently general in their nature to be applied to such cases. As a rule, no person can recover for an injury caused by his own consent. Under section 2322 of the ³⁰⁴ Civil Code, this has been especially applied to injuries by railroad companies, and, under section 3893, to torts generally.

Under section 3830, if a plaintiff by ordinary care could have avoided the consequences of defendant's negligence, there can be no recovery. These provisions apply to torts or to injuries done by another. But that is not this case, which is an action for loss insured against by contract. There are other provisions of the code which relate directly to such contracts. Section 2096 provides that: "The assured is bound to ordinary diligence in protecting the property from fire, and gross negligence on his part will relieve the insurer. Simple negligence by a servant, or the assured, unaffected by fraud or design in the latter, will not relieve the insurer." It is difficult to get the exact intention of the legislature from these words. They bind the assured to "ordinary diligence," and then in the next clause of the same sentence seem to relieve the insurer only in case of "gross negligence" by the insured. A want of ordinary diligence does not, of course, necessarily imply gross negligence. Nor does the following sentence relieve the difficulty: "Simple negligence," etc., "will not relieve the insurer." Section 2898 of the Civil Code declares that the absence of ordinary diligence "is termed ordinary neglect"; and section 2899 calls the absence of extraordinary diligence "slight neglect." Now, as to whether the words "simple negligence" in section 2096 mean ordinary or slight neglect, we are left absolutely in the dark. In view, however, of the ambiguity of that section, we think we are authorized to seek aid in its construction by reference to section 2100, which provides that any change in the property or the use to which it is applied, whereby the risk is increased, voids the policy. We have already seen that a mere temporary use, not causing such loss, was not intended to have this effect. But we think a fair construction of all the law bearing on this subject would render the insurer not liable, if the loss directly resulted from a temporary change in the use of the property by the assured, so materially increasing the hazard of insurance as to make it apparent to a person of ordinary intelligence and of reasonable or ordinary care and diligence that the danger from fire was ³⁰⁵ thereby enhanced. Such a construction would be consistent with the general principle of law, that no one can recover for an injury which was the result of his own negligence.

This policy was taken out in the name of the administrator as such, who was simply the representative of the estate intended to be protected by the insurance. At the time of the fire it was occupied as a home by the husband of the deceased and

her children, they being her only heirs. The record is not clear or definite as to what sort of contract, if any, existed between the administrator and the husband touching the occupancy of the house. We infer, however, that the husband had absolute custody of the premises and had perfect freedom to use the same in the conduct of his business, or that he had charge of it in the interest of the estate. He was directly responsible for the acts alleged to have increased the risk of insurance and to have occasioned the loss by fire. The question whether or not his acts bound the administrator, the real party insured, was not discussed in the argument. There is authority to the effect that an increase of risk by a tenant of the insured does not void the policy unless it contains a stipulation to the effect that such an increase by the tenant will render it null and void: See 2 Beach on Insurance, sec. 712, and authorities cited. There are also decisions cited to the contrary in the same work. We are inclined to think, however, that the correct rule on this subject is laid down by the supreme court of Pennsylvania in the case of *Long v. Lycoming Ins. Co.*, 14 Ins. L. J. 622, where it was held in effect that if the act which increased the insurer's risk was that of the tenant, unknown to the landlord, it was no excuse for the infringements of the covenants of the policy. If the husband occupied these premises under the circumstances indicated as inferable from the record, he would probably be clothed with more power and dominion over the property than in the case of an ordinary tenant who had no interest in the title; and we think his acts of negligence, if any, in this particular matter would be binding on the insured.

3. The loss having resulted in this case from an alleged increase of hazard by a change in the use of the premises, it ³⁰⁶ would seem practically to make no difference whether we treated the case on the theory of a suspension of the policy or on our idea of liability or a want thereof, as herein indicated; at least, so far as concerns the alleged error in the judgment granting a nonsuit. For in either case the question in its last analysis would turn on the negligence or want of negligence of the plaintiff. This particular question is one of fact, and when it becomes one of law on a motion to nonsuit, its correct determination depends upon the circumstances of each particular case. Questions of negligence being peculiarly for the jury in this state, in cases of any serious doubt its courts should always lean to such a construction of the testimony as will leave the matter at issue to the jury. They should avoid encroaching

upon the prerogative of that branch of the court, except in matters where the evidence is so plain and palpable as to demand a certain verdict and make any other finding shocking to a sense of justice and against human reason. Authorities may be found whereby, in similar cases, the courts of other states may, as a matter of law, have ruled that there could be no recovery. The safer rule, however, and the one which we think has been followed by the weight of authority, is to submit such issues to the jury. This course has been pursued in states some of whose decisions are relied on by counsel for defendant in error, and the trend of whose adjudications seems to hold the insured to a rigid liability for any acts of negligence in increasing the danger to the property insured from fire. In the case of *Long v. Lycoming Fire Ins. Co.*, 14 Ins. L. J. 622 (supreme court of Pennsylvania), it was decided that the temporary use of a steam thresher near the premises of the insured property materially increased the risk to the property insured, and therefore voided the policy. The court held in that case that as to whether or not there was such an increase was properly left to the jury. The same course was adopted with reference to submitting such an issue to the jury in the case of *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274, reported in *Richards on Insurance*, 452. We think this case should have taken a similar direction. We are not prepared to say, under the testimony in this record, as a matter of law, that the plaintiff is not entitled ³⁰⁷ to recover, or that the testimony demanded a finding that the destruction of this property was a result of the negligence of this tenant. Questions of negligence in such matters cannot always be safely determined from mere opinions in the human mind, not founded upon observation or experience, but based solely upon abstract reasoning that to do a certain thing will necessarily increase a risk, and therefore it follows that when loss results it is necessarily owing to the negligence of the party who committed the act. In this case the jury had before them the testimony of the plaintiff and the owner of the machinery, besides other witnesses, that in their opinion the temporary location of the engine where it was placed did not increase the hazard from fire. This testimony was not simply a bare opinion without reason therefor, but was founded upon facts stated by the witnesses. From their actual experience in observing and using such machinery themselves for a number of years, contiguous to houses, and from the fact that no fire before had ever occurred, and they had not even witnessed the burning of

a straw pile, some reason was given for the opinion they gave and upon which they acted. In the case of *Brink v. Merchants' etc. Ins. Co.*, 49 Vt. 443, it was decided that a tenant of premises insured, who had charge of all the business done thereon, and knew of all its details and processes, was a competent witness to give an opinion as to whether the business he was carrying on at the time of the fire increased the hazard of the insurer. In addition to these opinions of witnesses in this case, it further appears from the testimony that with a number of workmen on hand, even if a fire had occurred in the straw, had the weather remained in the condition it was in when the work began, there would have been no difficulty in preventing the house from igniting. Can the court then say as a matter of law, in the light of this testimony, that it shows that the plaintiff's tenant was not in the exercise of ordinary care and diligence, or that the fire was the result of his own negligence? Can it be further said that, as a matter of law, reasonable diligence would have required him to anticipate a violent wind-storm, such as this is described to have been, and which seems to have been the direct intervening cause that ³⁰⁸ communicated the fire to the property and produced its destruction?

We reverse the judgment of the court below, on the ground of error in granting nonsuit, without intending to intimate, of course, any opinion in regard to the weight of the testimony, except to say that in our opinion there was sufficient evidence in the case upon which to submit to the jury the controlling issue as to whether or not the fire was the result of the negligence of the plaintiff or his tenant, and whether or not the increase of risk, if there was any, was material, and was the result of a want of ordinary care and diligence on the part of the plaintiff or his agent or tenant having charge of the property.

Judgment reversed.

All the justices concurring, except Cobb, J., who was disqualified.

A CHANGE IN THE CONDITIONS OF THE INSURED PREMISES, such as operating an engine fifty feet away from an insured building, is not an increase of risk, unless expressly so declared by the contract of insurance; nor is the use on insured premises of an engine regularly employed in a tannery ground for releasing the company from liability for loss by fire resulting from the use of "any steam-engine temporarily employed for the purpose of threshing out crops"; and under a policy stipulating that, if an engine should be stationed on the premises, the company should appoint a committee to ascertain the increase of risk, if any, the use of the

engine does not of itself forfeit the policy nor increase the risk; but if the risk is increased, and loss by fire is caused thereby, the company, in case no additional premium note has been given, is released from liability: *Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 80 Md. 563, 45 Am. St. Rep. 361.

INSURANCE.—AN INCREASE OF HAZARD BY NEGLIGENCE in the use of kerosene, the policy stipulating that it should be avoided by an increase of hazard, does not relieve the insurer from liability for loss by fire resulting from the negligent use of kerosene by the insured in starting a fire in a stove: *Angier v. Western Assur. Co.*, 10 S. Dak. 82, 66 Am. St. Rep. 685; but where the insured stores unbaled hay in a part of the insured building, thereby increasing the risk, and gives no notice to the insurer, the policy is avoided: *Dittmer v. Germania Ins. Co.*, 23 La. Ann. 458, 8 Am. Rep. 600.

INSURANCE—FIRE.—INCREASE OF HAZARD AND NEGLIGENCE, in a suit upon a policy of insurance, are questions for the jury: *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535, 20 Am. Dec. 547; *Padelford v. Providence etc. Ins. Co.*, 3 R. I. 102, 67 Am. Dec. 496. For an extended discussion of increase of hazard, see note to *Angier v. Western Assur. Co.*, 66 Am. St. Rep. 691-702.

BAKER v. AULTMAN.

[107 GEORGIA, 389.]

ATTACHMENT ON LAND—SUFFICIENCY OF LEVY.—In order to constitute a valid levy of an attachment upon land, whether occupied or vacant, and to give the necessary notice to the nonresident owner, the officer must do some act which shows that he has seized the property and exercised dominion over it; otherwise the court acquires no jurisdiction over the land. The mere fact that an officer makes an entry of levy upon an attachment is not sufficient to constitute a valid levy upon land belonging to a nonresident, nor does a statement made by the attorney of the plaintiff to the owner of the land, that it has been seized under attachment, and that the proceedings are then pending, constitute such notice to the attachment defendant as will give the court jurisdiction.

R. J. & J. McCamy, for the plaintiff in error.

Payne & Payne and J. H. McLean, for the defendant in error.

340 **SIMMONS, C. J.** C. Aultman & Co. sued out an attachment against Baker, a nonresident of the state, and the sheriff made an entry of levy upon the attachment. It appears that the sheriff did not go upon the land or seize it or do any other act which would indicate that he had taken possession of it. The plaintiff's attorney wrote out the form of the entry of levy upon the attachment, and this was signed by the sheriff in a town seven miles distant from the land levied upon.

There was no effort made by the sheriff to give Baker any sort of notice. The only notice it is claimed he received was that the plaintiff's attorney met him in the city of his residence and informed him of the attachment and levy. Judgment was rendered against the land, and it was advertised to be sold by the sheriff. Thereupon Baker filed an affidavit of illegality, upon the ground that he had never been served in the action, that he had never appeared and pleaded nor authorized anyone to do so for him, that he had never waived service, and that he had never had any notice of the pendency of the attachment. On the trial of the illegality, when these facts were made to appear, the court directed a verdict against the illegality.

1. We think the court erred in directing a verdict against the illegality. In order to constitute a valid levy of an attachment upon land in this state and to give the necessary notice to the nonresident owner, the officer must do some act which shows that he has seized the property and exercised dominion over it—some act that is sufficient to put the owner or his tenant upon notice that the officer has seized the land ³⁴¹ and is in possession of it. Otherwise, the court acquires no jurisdiction over such land. The levy of the attachment is the commencement of the suit against the nonresident, and there must be something done by the officer to give the owner constructive notice that such a suit is pending, before the court acquires jurisdiction to render judgment. There must be a seizure of the property, and the seizure must be such as to affect the owner with notice of the levy. Without it the court has no jurisdiction, and cannot proceed to judgment against either the defendant or his property. The law must provide in some way for notice to the defendant, so that he may appear and plead; otherwise, it would be taking his property without due process of law. The question now under consideration has been fully discussed and decided by this court in the cases of *Smith v. Brown*, 96 Ga. 274, *New England etc. Co. v. Watson*, 99 Ga. 733, and *McCrory v. Hall*, 104 Ga. 666; and it is useless to further elaborate the subject, except to say that the levy of an attachment, being the commencement of the suit, is different from the levy of an execution founded upon a judgment against the owner of the property levied upon. All that is necessary in the latter case is for the sheriff to make his entry upon the fieri facias, and give notice to the tenant in possession. This is, in this state, a legal levy; for the defendant has already had his day in court

and has suffered the judgment to go against him. The levy of an attachment is quite different. Such levy is generally the notice of the suit, and the statute does not provide for any other or further notice to the owner of the property. If he be a nonresident and his land is unoccupied, simply making an entry of levy could give him no notice of the pending proceedings.

2. We think that the notice given Baker by the plaintiffs' attorney in Chattanooga, Tennessee, was not sufficient. The notice required to be given is, in our opinion, to be given by an official act which will affect the owner with constructive notice of the seizure of the property. The statement of the attorney to Baker was not such an official act as would give the court jurisdiction. Counsel for defendant in error relied upon the case of *Steers v. Morgan*, 66 Ga. 552. The facts of that ³⁴² case were different from those shown here. In that case it appears that the attachment was levied and a garnishment served upon parties indebted to Steers & Co. The garnishment seized and impounded the property in the hands of the garnishees. This was an official act, and was in itself sufficient notice; for by reason of the garnishment founded upon the attachment the property was seized. Besides, the garnishees gave actual notice that the property had been held up in their hands. The court held that the notice was sufficient to put the defendants upon inquiry as to the attachment proceedings.

Judgment reversed.

All the justices concurring.

IN THE CASE of *Smith v. Brown*, 96 Ga. 274, referred to in the principal case, it was decided that it was essential to the validity of a judgment rendered in an attachment case for the purchase price of land that the defendant in attachment should have notice of the proceeding, and that a mere entry by the sheriff on the attachment that he had levied such attachment on the land, followed by another entry stating that he had "notified defendant of the above levy by mail," does not amount to such notice. These facts and acts do not, without more, constitute a valid levy of the process of attachment.

In *New England etc. Co. v. Watson*, 99 Ga. 733, it was again decided that "an entry by the sheriff upon an attachment sued out against a nonresident of the state, stating in substance that the officer had levied the attachment upon certain described land, and containing nothing else except the words, 'tenant in possession notified this day in writing,' did not, without more, constitute a valid levy of the attachment so as to give the court to which the attachment was returnable jurisdiction to enter a judgment thereon against the defendant in attachment, the latter having never appeared to make defense to the action, and it not appearing that he had been, either in person or by tenant, in possession of the land. A judgment thus rendered was void and open to collateral attack."

Again, in the case of *McCrary v. Hall*, 104 Ga. 666, it was decided that "it was the right of a claimant, after the plaintiff in execution had put in evidence the fieri facias levied, it being upon its face apparently regular and valid, to introduce testimony for the purpose of showing that such fieri facias was issued upon a special judgment purporting to have been rendered in a case begun by the levy of an attachment upon land therein described, that there had been no lawful levy of the attachment, and that, as a consequence, the judgment was void." This may be shown by proving, either by the sheriff, or by a certified copy of the bond and affidavit in the attachment case, together with the levy, that the sheriff, at the time he levied the attachment, did not enter upon and seize the land, and give the defendant in attachment or the tenant in possession notice of the levy. This testimony, if uncontroverted, is pertinent as laying the foundation for a motion to dismiss the levy, or, if disputed, it is competent as affording a basis for invoking instructions to the jury for their guidance in case they found it true.

ATTACHMENT ON LAND—SUFFICIENCY OF LEVY.—It is not requisite to the validity of an attachment on real estate that the officer should go upon the land, or into its vicinity: *Riordan v. Britton*, 69 Tex. 198, 5 Am. St. Rep. 37; *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575. And notice of levy on land need not be given by the sheriff to execution defendant to constitute a valid levy: *Duncan v. Matney*, 29 Mo. 368, 77 Am. Dec. 575.

JAMES v. KELLEY.

[107 GEORGIA, 446.]

ADMINISTRATOR'S SALE—BID BY WIDOW.—If, at an administrator's sale of land, the auctioneer conducting the sale, on request of the administrator, cries a specific sum as being bid for the land by the widow of the intestate, who is not present, and, that being the highest bid, she becomes the purchaser, these facts do not afford the other heirs sufficient grounds to set aside the sale in the absence of specific allegations of fraud, or that any discretion was given the auctioneer, or that he was authorized to bid for the widow any other or different sum.

FRAUD.—PLEADINGS must state specifically the facts upon which fraud is founded. General charges of fraud cannot be considered.

J. P. Brooke, for the plaintiffs.

T. L. Lewis and Abbott, Cox & Abbott, for the defendants.

447 LITTLE, J. James and another filed a petition in the superior court of Milton county, against B. E. Kelley, administrator of B. M. Kelley, and Nancy Kelley, making substantially the following case: The intestate died in 1887, owning a tract of land in said county, which was described. He left sur-

viving him eight heirs at law, two of whom were the plaintiffs, and two the defendants. After the death of the intestate, the defendants remained on the land and received the rents and profits for a number of years. Petitioners in 1895 filed a petition to the ordinary of the county, praying that administration of the estate of the intestate be vested in the clerk of the superior court. When said petition came on for a hearing, the defendant B. E. Kelley claimed the right to be, and was, appointed such administrator. He made application for leave to sell the land belonging to his intestate, and an order was duly granted for him to do so. He advertised the same for sale on the first Tuesday in August, 1896, before the courthouse door at the county seat of Milton county, prescribing that the terms of the sale should be half cash, and the other half to be due on December 1, 1896, with interest at the rate of eight per cent. At the time and place of sale an auctioneer, who was employed by the administrator to cry the land, announced the sale and read the advertisement. The auctioneer then publicly announced that he was authorized to cry a bid for the widow, meaning Nancy Kelley, defendant, of three hundred dollars for the land. No other bid was made, and Nancy Kelley was named as the highest bidder. She was not present at the place of sale, nor in the town. The petition further alleges ⁴⁴⁸ that the administrator did all in his power to aid Nancy Kelley in procuring the lands, had the bid made for her, and that such bid was not one-third of the value of the land; that the administrator told the auctioneer to announce that he was authorized to cry a bid of three hundred dollars for the widow, seeking thereby to induce others not to bid; that there were others present who came to bid, but did not do so because they did not desire to appear as bidding against the widow. The petition further alleges that it was the purpose of the defendants to defeat petitioners in acquiring their interest in the land, and that the advertisement and sale of the land in the middle of the summer, when such sales are rarely made and persons generally are not prepared to purchase, and having the auctioneer to cry the bid for the widow for a sum less than one-half the value of the land, were the means used by the administrator to defraud them of their interest in the land; that his purpose was that he might continue to enjoy the use of the same. The petitioners allege that they do not know whether a deed was made by the administrator under such sale, but pray that the sale be declared null and void, and the administrator

ordered to resell the same; and, if any deed has been made conveying the same to Nancy Kelley, that it be canceled. To this petition the defendants demurred generally. The court sustained the demurrer and dismissed the petition; and the plaintiffs excepted.

It is claimed on the part of petitioners that the facts set out showed such fraudulent conduct on the part of the administrator in conducting the sale that it should be set aside; and we are referred to a number of decisions of this court, showing that the utmost fidelity on the part of an administrator in the sale of the property of the estate is required. The principle is fully and entirely conceded. The administrator is a trustee, and, as such, he must exercise the utmost good faith in his administration, and he is not allowed to promote his own personal interest to the injury of the heirs at law. The point is insisted on that if the administrator is allowed to represent the bidder in making the first bid at a sale, it is certainly allowable for him to make the second bid, and eventually become the purchaser.⁴⁴⁰ The case of *Mayor v. Huff*, 60 Ga. 221, is referred to as authority to support this contention. An examination of that case, however, discloses that this court held, in effect, that public policy forbade that the mayor of a city should make a contract with the city council, of which he was the president, by which he should be paid an annual sum for fencing, draining, and keeping a certain park in repair for the period of five years, when it was the official business of such mayor to see that such a contract was faithfully performed; and that the city was not legally bound thereby. The principle on which this, as well as many cases both of our own and other courts were decided is, that a man cannot be a judge in his own case, and that it makes no difference how fair such a contract may be, public policy condemns it. We are also referred to a number of cases as authority for the principle that an administrator cannot buy at his own sale, and that a deed made pursuant to such purchase, though in the hands of a third person who purchased from him with notice, may be set aside. We concede the correctness of the rule contended for, and the binding authority of the cases cited. It may be stated generally that sheriffs, auctioneers, and others who are legally authorized to make sales at public outcry represent the sellers of the property, and, in consequence of such representation, cannot become purchasers at the sale so made. In the case of an administrator who purchases at his own sale, the rule is, that the sale

is voidable at the option of any one of the heirs, if application is made in time. But the rules invoked by the plaintiffs in error, and the principles decided in the cases cited, do not, in our opinion, require, under the allegations made in the petition that the sale of which complaint is made should be set aside and the deed canceled. It does not appear from the petition that either the administrator or the agent employed by him became the purchaser at such sale. On the contrary, it is alleged that the widow was the purchaser. It was practically decided in the case of *Bond v. Watson*, 22 Ga. 637, that an administrator might appoint an agent to sell. In other jurisdictions this power has been denied him. In the case referred to, however, it was held that, if the administrator made an agent ⁴⁵⁰ to sell, and that agent became the purchaser for himself or another, the sale might be repudiated by the parties in interest. Applying the principle ruled in that case to the facts stated in the petition, we find that the auctioneer who made the sale of the land in controversy was the agent of the administrator, and, of course, the acts of this agent were binding on the principal, and, if the agent became the purchaser either for himself or another, then it was the right of the plaintiffs in error to repudiate the sale and have it set aside. But the petition here shows that neither the agent nor the administrator became the purchaser, and the misapplication of the principle which governs occurs in confusing the crying of a bid with the fact of a purchase.

We do not at all understand that an administrator may not, after a sale has been duly advertised in pursuance of lawful authority, receive in good faith, from anyone who cannot personally attend at the time and place of sale, a bid for the property so to be sold. Indeed, in *Rorer on Judicial Sales*, second edition, section 745, it is said: "It is not, in itself, an objection to a bid at a sheriff's sale of land on execution, that it is made by letter, provided there be no unfairness about it, and it be publicly cried as bids usually are. If there be no advance on a bid so offered, the officer will be justified in selling on it as he would be in selling on a bid orally made, all other circumstances being the same. But a creditor has a right to insist on all the forms. If, however, the bid be not publicly cried at the appointed place of sale, but received and privately noted in the house instead of at the door or place appointed, or there be other evidence of collusion or unfairness, the sale will be set aside." This we take to be the correct rule. It is altogether

different from a transaction where the agent appointed to sell proceeds himself, without crying an authorized bid, to become the purchaser. In the one case, prospective purchasers are as much informed as to who is the bidder and the amount so bid as if the person making the bid was present and offered it personally. In the other, no notice is given as to who is the bidder nor the amount bid, and in this latter event it would be entirely in the power of the agent selling, if he was invested with a discretion ⁴⁵¹ to buy, by regulating his own bid according to the circumstances which surround him, to defeat the right of the creditors where it was an execution sale, or of the heirs at law where the sale was made by an administrator, to have such property fairly and openly sold for the best price obtainable. But we take it that the numerous cases to be found in our books, notably those of *Carr v. Houser*, 46 Ga. 477, *Flury v. Grimes*, 52 Ga. 341, *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435, and *Coleman v. MacLean*, 101 Ga. 303, are not to be held as authority that any trustee may not in good faith receive, and announce at the time and place of sale, a bona fide bid communicated with the purpose and for the object of being a bidder at the sale. In the case of *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435, the lower court held, in effect, that a sheriff could, at his own sale, become the agent of an absent purchaser and buy the property for that person at his own sale. It was that ruling that the court reversed, and called attention to the fact that the question whether the sheriff could not act as the agent of a purchaser to make a definite bid, where no discretionary powers are conferred, was not made by the record. The petition alleges, in the present case, that the bid was cried immediately after offering the property for sale and reading the advertisement, and that the crier in doing so announced that he was authorized to cry a bid of three hundred dollars for the widow. The fact that she was not present did not prevent anyone in attendance from knowing that she was the bidder just as fully as if she had been personally present. The bid was a definite one, and, so far as the petition alleges, the seller was invested with no discretionary power as to the purchase of the land. The fact that the land was sold in the month of August does not show any fraud in the sale. The legal requirements do not restrict such sales to any particular months, nor any given season of the year. The administrator was proceeding to sell under an order duly granted, after full advertisement, at a time and place authorized by law.

The widow had a right to become a bidder. She could do so by being personally present or by otherwise communicating a definite bid. No cause appears why the land did not bring a larger sum, except that the persons present did not care to bid against the ⁴⁵² widow. Exactly the same thing would have operated on them had she been present and offered her bid. The charges of fraud and collusion other than the foregoing, and the intent on the part of the administrator to defraud petitioners in such sale, are made in general terms, with no other specific acts alleged than those which have been enumerated. The rule is, that the pleadings must state facts and not legal conclusions; and fraud is never sufficiently pleaded except by a statement of the facts upon which the charge is based. General charges will not be considered: *Tolbert v. Caledonian Ins. Co.*, 101 Ga. 741. For these reasons, the petition presented did not set forth a cause of action, and the court committed no error in sustaining the demurrer to the same.

Judgment affirmed.

All the justices concurring.

EXECUTOR'S SALE—WIDOW A PURCHASER.—Where the executor, under a supposed power in the will, sells lands of his testator to the widow, the personal property being known to be adequate for the payment of all liabilities against the estate, and she does not pay the purchase price, but receipts for it as so much personalty, and the proceeds of the sale at the final settlement of the executor's accounts are considered as personalty, the heirs are not estopped to maintain an action against the widow for the recovery of the land so conveyed to her: *Sweeney v. Warren*, 127 N. Y. 426, 24 Am. St. Rep. 468.

FRAUD—PLEADING.—In pleading fraud it is not sufficient to allege in general terms, but the facts must be specially pleaded: *Phenix Iron Works v. McEvony*, 47 Neb. 228, 53 Am. St. Rep. 527; and this is true in cases of constructive fraud as well as of actual: *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; but see note to *Huston v. Williams*, 25 Am. Dec. 95.

JACOBUS v. CONGREGATION OF THE CHILDREN OF ISRAEL.

[107 GEORGIA, 518.]

CEMETERIES—DAMAGES FOR REMOVAL OF BODY.—A person who is the owner of the easement of burial in a cemetery lot, or rightfully in possession of such lot, is entitled to recover damages from anyone who wrongfully enters upon such lot and disinters the remains of a person buried therein.

CEMETERIES—DAMAGES FOR DISINTERMENT OF BODY.—In a suit for damages for disinterring a body buried in a cemetery, if the injury was wanton and malicious, or the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded, and in estimating them the injury to the natural feelings of the plaintiff may be taken into consideration.

CEMETERIES—DAMAGES FOR INJURY TO GRAVESTONES.—If a gravestone or monument erected on a cemetery lot is defaced or removed during the lifetime of the person erecting it, he may recover damages from the one who inflicts the injury, and, if it is inflicted after his death, the heirs of the person in whose memory the stone was erected are entitled to maintain the action.

DAMAGES—EXEMPLARY—PLEADING.—A complaint setting forth a good cause of action for exemplary damages, and praying that a designated amount, as "exemplary damages," be awarded plaintiff, "as expenses of bringing these proceedings" is not vitiated by the latter phrase, as that may be treated as mere surplusage.

S. F. Garlington and F. W. Capers, for the plaintiff.

C. H. Cohen and Russell & Rosenfield, for the defendant.

519 FISH, J. The defendant in the court below moved to dismiss the plaintiff's petition, upon the ground that no cause of action was set out therein. The court sustained the motion, and the plaintiffs excepted. The petition alleged, in substance, that the three plaintiffs are the children of Jacob Jacobus and his wife Manahn, who had born unto them two other children, Harold and Irene, both of whom died in infancy. In January, 1856, Jacob Jacobus purchased of the defendant, a corporation owning and controlling certain burial grounds located in the city cemetery of Augusta, a certain described lot, or square, in such burial grounds, and paid for the same. This lot, or square, is inclosed by a row of brick. In 1856 the remains of his infant son Harold, and in 1858 the remains of his infant daughter Irene, were interred by him on this lot. Jacob Jacobus died in 1862, and his wife in 1894. The remains of the plaintiffs' brother and sister remained undisturbed from the dates when they were respectively buried until 1895, when

the defendant, through its duly appointed and constituted officers, willfully, unlawfully, and without warrant or authority and without the knowledge of plaintiffs, entered upon such lot, removed the headstones from the two graves, took therefrom the caskets containing the remains of the plaintiffs' brother and sister, opened the caskets and exposed the contents of the same to the view of people, and then reinterred the remains in an obscure part of the defendant's burial grounds. After removing the headstones and caskets, the defendant sold or gave the lot to another person and permitted him to bury a body therein. The removal of the bodies of the plaintiffs' brother and sister "to an obscure portion ⁵²⁰ of said burial grounds" was "much to the chagrin, mortification, humiliation, insult, and injury" of the plaintiffs, and in the removal and the acts accompanying the same "a most serious injury has been done" to the plaintiffs, and an insult inflicted upon them "which money cannot repair and which time cannot eradicate." The petition prayed that the officers of the defendant corporation be directed and commanded to reinter the remains of the plaintiffs' brother and sister in the lot from which they had been removed, "in a grave to be walled and securely cemented, as was the grave in which they formerly reposed"; and that "the nominal sum of two hundred and fifty dollars, as exemplary damages, be awarded to . . . petitioners, as expenses of bringing these proceedings." At the hearing, counsel for the plaintiffs stated that, since the filing of the suit, the defendant had complied with the prayer of the petition in reference to reintering the remains upon the lot from which they had been removed, "and that suit was proceeding for the collection of the expenses of this suit, including attorney's fees."

1. According to the allegations of the petition, Jacob Jacobus, the father of the plaintiffs, purchased the burial lot from the defendant, paid for it and took possession of it, in the only way that he could, by using it for the purposes for which it was intended—he buried his dead upon it. He had both the possession and the right of possession, and remained in possession until his death. At his death the possession and the right of possession were transmitted to his heirs at law. Having once been established, the possession, unless voluntarily relinquished, continued as long as the graves were marked and distinguishable as such and the cemetery continued to be used: *Hook v. Joyce*, 94 Ky. 450; *Bessemer Land Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26. "The burial of the dead body

in a cemetery lot is the only possession, when claimed and known, necessary to ultimately create complete ownership of the easement so as to render it inheritable; and, so long as gravestones stand marking the place as burial ground, the possession is actual, adverse, and notorious": *Hook v. Joyce*, 94 Ky. 450. "When one is permitted to bury his dead in a public cemetery, by the express or implied consent of those in control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to an action against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it. This right of possession will continue as long as the cemetery continues to be used": *Bessemer Land Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26. As a general rule, one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only the easement or license of burial therein. But, as we have seen, so long as he is in the rightful possession of the lot, or holds title to the usufructuary interest therein, he may maintain an action against anyone who wrongfully trespasses upon it. The rule is well established that one entitled to maintain the action may recover damages from any person who wrongfully trespasses upon, desecrates, or invades the burial lot of another: 1 Am. & Eng. Ency. of Law, 2d ed., 794; *Trustees etc. v. Walsh*, 57 Ill. 363, 11 Am. Rep. 21; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Partridge v. First Independent Church*, 39 Md. 637; *Smith v. Thompson*, 55 Md. 5, 39 Am. Rep. 409; *Thirkfield v. Mountain View Cemetery*, 12 Utah, 76; *Hook v. Joyce*, 94 Ky. 450; *Bessemer Land Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26. In the present case, the plaintiffs were not only in possession of the lot at the time of the alleged trespass by the defendant, but, as the heirs at law of Jacob Jacobus, they had a complete title to the easement of burial therein by prescription; for the graves containing the remains of their brother and sister had been upon the lot, undisturbed, for nearly forty years. The presence of these graves, marked with headstones, upon the lot rendered the possession, which commenced in Jacob Jacobus when he buried the first body upon it, actual, adverse, and notorious; and it was continuous until disturbed by the defendant in 1895.

2. In a suit for damages for disinterring a dead body, if the injury has been wanton and malicious, or is the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages

may be awarded: 1 Am. & Eng. Ency. of Law, 2d ed., 794; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Thirkfield v. Mountain View Cemetery, 12 Utah, 76. ⁵²² Where such an action is maintainable, the injury to the natural feelings of the plaintiff may be taken into consideration in estimating the damages which he has sustained: Cooley on Torts, 240; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Bessemer Land Co. v. Jenkins, 111 Ala. 135, 56 Am. St. Rep. 26. Our own code provides that: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff": Civ. Code, sec. 3906. According to the allegations of the petition this was clearly a tort, in which there were aggravating circumstances. It was, as made by the petition, a case in which a jury could rightly have awarded exemplary damages.

3. Irrespective of the plaintiff's title to the easement, or their possession of the lot, the petition stated a good cause of action for damages for the removal of the gravestones. If a gravestone or monument which has been erected upon a cemetery lot is defaced or removed during the lifetime of the person who erected it, he may, at common law, recover damages from the one who inflicted the injury; but if the injury is inflicted after his death the heirs at law of the person to whose memory the gravestone or monument was erected are entitled to maintain the action: Day v. Beddingfield, Noy, 104; Spooner v. Brewster, 3 Bing. 136; Sabin v. Harkness, 4 N. H. 415, 17 Am. Dec. 437; Matter of Brick Presbyterian Church, 3 Edw. Ch. 155; Mitchell v. Thorne, 134 N. Y. 536, 30 Am. St. Rep. 699; Pierce v. Proprietors, etc., 10 R. I. 227, 14 Am. Rep. 667. If these gravestones were erected by Jacob Jacobus to mark and designate the graves of his children, then if they had been injured or removed during his lifetime, he would have had a right of action against whoever inflicted the injury. While it is not distinctly averred that he did erect them, we think it is a fair presumption that he did, from the fact that he was the father of these infant children, purchased the lot, and had their bodies interred therein. After his death, the right to sue for a trespass committed by defacing or removing the gravestones was in the heirs at law of the persons to whose memory the stones were erected, that is, the heirs at law of the children whose remains ⁵²³ were interred in the graves. Whether the plaintiffs, or either of them, were in life at the time that either of

these children died, does not appear from the petition; but, if they were not, the father and mother became heirs at law of the deceased children, and at the time the stones were removed by the defendant the plaintiffs were the heirs at law of both the father and the mother. So the right of action belonging to the heirs at law of these children, for the trespass committed by the removal of the gravestones, was in the plaintiffs at the time this injury was inflicted. This is clear when we consider that a monument or gravestone which designated the grave of a particular person was considered by the common law in the nature of a family heirloom, and for this reason the common law, after the death of the person who erected it, gave to the heirs at law of the person in whose memory the stone was set up the right to maintain an action against anyone who injured or removed it.

4. The mere fact that the plaintiffs added to their prayer, "that the nominal sum of two hundred and fifty dollars, as exemplary damages, be awarded your petitioners," the words, "as expenses of bringing these proceedings," does not alter the case. These words can be treated as mere surplusage, the statement of the cause of action being complete without them. They could be stricken and the cause of action would remain. Their presence does not have the effect of destroying what would otherwise be a good cause of action. It matters not to what purpose the plaintiffs intended to devote the amount which they might recover as damages. They might, if they saw fit, use the whole of the amount recovered by them in paying counsel fees and other expenses of litigation, incurred by them in bringing and prosecuting to a successful issue the suit to establish and vindicate their rights, which seems to have been their main purpose, and a mere declaration in the petition of a purpose on their part to so use the sum which they might recover as damages could not affect their right to recover such damages. Of course, anything that the defendant did, after the suit was filed, by way of amends for the injury which it had inflicted upon the plaintiffs, unless accepted by the plaintiffs ⁵²⁴ as a settlement of the case, would not affect the cause of action, though it might be a circumstance which could be shown in mitigation of the amount to be allowed as damages. As the petition set forth a good cause of action, the court erred in sustaining the motion to dismiss it.

Judgment reversed.

All the justices concurring.

CEMETERIES—DAMAGES FOR REMOVAL OF REMAINS.—One who buries his dead in soil to which he has a freehold right and the right of possession can maintain an action *quare clausum fregit* against a person who disturbs the grave; so can one who has buried his dead in a public cemetery maintain such an action against the owners of the fee or strangers, who negligently or wantonly disturb the grave; and, in an action to recover damages for the unlawful removal of plaintiff's child from its burial place, the injury to the natural feelings of the plaintiff may be considered by the jury in estimating the damages: *Bessemer Land etc. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26.

CEMETERIES—DAMAGES FOR INJURY TO GRAVESTONES. The heirs of a decedent, at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes the same: *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 699.

DAMAGES.—Expenses of litigation are not an element of compensatory damages, and can be considered only in those cases in which exemplary damages may be awarded: *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213.

SOUTHERN EXPRESS COMPANY v. STATE.

[107 GEORGIA, 670.]

INTOXICATING LIQUORS—"FURNISHING"—WHAT IS NOT.—A carrier who transports intoxicating liquors under a contract to carry and deliver the goods to the consignee at their destination does not, by such transportation and delivery, violate a statute providing that it shall be unlawful "for any person to sell, either directly or indirectly, or furnish at any place of business, or any public place, by any device whatever, any intoxicating liquors."

F. G. du Bignon, for the plaintiff in error.

S. P. Maddox, solicitor general, for the defendant in error.

⁶⁷⁰ **LITTLE, J.** The grand jury of Bartow county returned a special presentment against the plaintiff in error, charging it with a misdemeanor. The specific allegation of such charge is, that the plaintiff in error, on the first day of November, 1898, in Bartow county, being a corporation there doing business, did unlawfully furnish, to certain persons named, intoxicating, alcoholic, and malt liquors, at the office of the plaintiff in said ⁶⁷¹ county, the same being a public place. The case was tried under an agreed statement of facts, which was, in substance, that the plaintiff in error was a common carrier; that as such it received, by its agent at Cartersville in said county, and at its office which was located in the depot of the

Western and Atlantic Railroad, a public place, packages of spirituous liquors in jugs and bottles, for various parties resident in Bartow county, and delivered these articles to the persons to whom they belonged. The shipments of such articles were made from points within the state of Georgia where the sale of such liquors is authorized by law. The shipments were not made collect on delivery, nor were any special conditions or instructions attached. The parties to whom the articles belonged, and to whom they were consigned and delivered, paid the agent of the plaintiff in error, at the time of the delivery, only the express charges for transportation. Under the charge of the court, the jury returned a verdict of guilty against the plaintiff in error. It made a motion for new trial, on the ground that the verdict was contrary to law and to the evidence, and because the court erred in charging the jury that, if the jury believed the facts submitted under the agreed statement, the plaintiff in error was guilty of the offense charged in the indictment. The motion for new trial was overruled, and exception taken to this action of the court. No question is made on the legality of the special presentment, nor on the liability of the plaintiff in error to be so charged and tried. The special presentment was based on an act of the general assembly, admitted to have been in force in Bartow county at the time named, which provides as follows: "It shall not be lawful for any person or persons to sell, either directly or indirectly, or furnish at any place of business or any other public place, by any device whatever, any intoxicating, alcoholic, spirituous, vinous, or malt liquors within the limits of said county." The act contains a proviso to which it is not necessary that reference should be here made.

The evident object of this act was to curtail and restrict the use of intoxicating and malt liquors in Bartow county. It entirely prohibits any sale of such liquors. It also prohibits the furnishing at any place of business or other public place **672** in said county, by any device whatever; and the single question presented to us for determination is, What is the legal meaning and significance of the word "furnish," as used in the statute? That meaning and significance, of course, which the lawmakers intended it should have must be given to it. The primary object being to restrict the use of liquors, and the sale and purchase being the method by which the use is most generally extended, the general assembly forbade the sale absolutely, but went farther, in order to accomplish the purposes intended,

and declared that the furnishing at any place of business or other public place, by any device whatever, should be a misdemeanor. Liquors are always furnished when there is a delivery, but a person may be furnished by other means than a sale, and the general assembly, by the use of the word, intended to impose further restrictions than those embraced in the prohibition of the sale. It is made a misdemeanor to sell or to furnish by any device whatever. While the meaning of the word "furnish" is not restricted, the language "by any device whatever," used in connection with that word, would seem to indicate that it meant to reach a class of cases not technically sales, because of some device which prevented the act of furnishing from being a sale. If this be a fair criticism of the words used, then the evident intention of the lawmakers was to reach a class of cases which involved some of the elements of a sale, but which might not be obnoxious to the statute because of a device by which other elements of a sale were wanting. But however this may be, we are not disposed in this case, even by fair implication, to abridge the construction which might otherwise be placed on the words of the act. Treating them as making an inhibition against furnishing liquors at any place of business or any other public place in Bartow county, we come to inquire whether, under the agreed statement of the facts, there was a violation of the statute.

The plaintiff in error is a common carrier, and as such is bound to receive and transport articles and property offered to it for shipment under reasonable rules and regulations. In the case of *Fears v. State*, 102 Ga. 274, this court held that, notwithstanding the local option liquor law was in force in a particular county, a right of property in spirituous and malt liquors existed in that county. Being property, it was, under existing law, the duty of a common carrier to receive and transport it for a reasonable hire, according to the direction of the owner or sender of the same, unless such transportation has been prohibited by the law-making power. It has been held that, where such statutes are in force, common carriers are not bound to transport commodities, for the doing of which they would incur a penalty, as such carriers are neither required nor permitted to do illegal acts: *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706. And where an act forbade the conveyance of liquors by express companies, it was held that the driver of a team for one who undertakes to deliver liquor is punishable: *State v. Campbell*, 76 Iowa, 122. The law-making power of this

state has not yet seen proper to declare the transportation of liquors by common carriers illegal; and inasmuch as rights are vested in liquors, just as they are in any other property, it is, in the absence of such a statute as we have indicated, the public duty of the carrier to receive and transport liquors. But it may be said that, notwithstanding the duty, and notwithstanding the fact that after such transportation and the arrival of the property in Bartow county, the carrier was forbidden to deliver such property to the owner at any place of business or in any public place, although he might be allowed to deliver it in a private place. This cannot be a proper interpretation of this act. The law does not contemplate that the exercise of duties placed upon persons for the benefit of the public be made privately, not openly, secretly and not in the full light of day. The secret, as well as the open, traffic in liquors, is what this act prohibits. The bargain and sale, as well as the device in furnishing, are equally obnoxious to its terms. The mere delivery by a carrier of liquors to the consignee in Bartow county does not come, as we understand it, within the prohibition of furnishing such liquors. "Furnish" is "to provide for use; to supply." A "furnisher" is "one who furnishes or provides supplies of any kind": Century Dictionary. A "furnisher" is "one who supplies or fits out": Webster's International Dictionary. To furnish or supply necessarily carries with it the idea of ownership, property in, or ⁶⁷⁴ dominion over the thing furnished by the one who furnishes. Counsel for defendant in error cites us to the case of *Burnett v. State*, 92 Ga. 474, where this court held that where one receives money from a minor with which to procure and pay for liquor, and at the minor's request purchases and delivers liquor to him, this would be furnishing intoxicating liquors to a minor. With the correctness of the decision made in that case we are entirely satisfied. But the principle involved there has no application, as we think, here. It is true that the liquor purchased was with money, the property of the minor, but it is not true that when his agent purchased the liquor with the minor's money it became the property of the minor. It was unlawful to sell to him. While his agent was guilty of furnishing liquor to a minor, the original owner was none the less so, if he knew that the person procuring the liquor was the agent of a minor. It has been repeatedly held that a saloon-keeper who allows an adult to buy intoxicating liquor and give it to a minor to drink in his saloon is guilty of a violation of the statute against

furnishing liquors to minors: *People v. Neumann*, 85 Mich. 98; *State v. Best*, 108 N. C. 747; *State v. Munson*, 25 Ohio St. 381. In the *Neumann* case, it was held that "if the liquor belonging to the person and under his control is, by his consent or connivance, permitted to be taken and drank by the minor, whether it is passed to him direct or from the hands of another is immaterial; the liquor in either case is furnished to such minor, within the meaning of our statute." But it must be noted that in the case relied on by the state the agent received from the minor the money with which to purchase the liquor. He, therefore, did not simply bring to him the liquor, but he also purchased it for him, and certainly he supplied it, for he had dominion over it. There was no legal duty on him to carry and deliver the liquor. Indeed it was his legal duty not to do so. The cases are not parallel. Delivery by a seller of goods to a carrier to be transported to the purchaser, the consignee, without more, is a delivery to the purchaser, under the ordinary contract of purchase; and, under the agreed statement of facts when the packages of liquor were delivered to the express company at the shipping point, the sale was complete at ⁶⁷⁵ the shipping point, and vested title to the property in the consignee: *Doster v. State*, 93 Ga. 43. If anything was required further to be done to complete the sale—such, for instance, as if the express company had received the packages to collect on delivery, then the sale, as has been ruled by this court in the case of *Crabb v. State*, 88 Ga. 584, would have only been completed on the delivery of the goods to the consignee, and the agent of the express company so delivering and collecting the amount of the purchase price would have been guilty of selling. The sale having been completed at the place of the shipment, and title to the property having vested in the consignee by delivery to the carrier at that point, it only remained for the express company to transport and deliver it. This, under existing law, it was bound to do, and in so doing it was in no sense the furnisher of the liquor, which the packages contained, to the consignees.

Judgment reversed.

All the justices concurring.

INTOXICATING LIQUORS—INDIRECT SALES.—A treasurer of an association, whose qualification for membership is one dollar, for which was received a ticket with numbers from 1 to 20 upon it, and used in payment of twenty drinks at the bar, is guilty of selling intoxicating liquors: *Note to Walter v. Commonwealth*, 32 Am.

Rep. 433; so, too, if the furnishing of liquors to its members is the principal or, perhaps, one of the co-ordinate purposes of the organization: *People v. Adelphi Club*, 149 N. Y. 5, 52 Am. St. Rep. 700; or if a principal sells through his agent, clerk, or employé: Note to *Snider v. State*, 12 Am. St. Rep. 354; but there is no unlawful selling if the real purpose of the club is to maintain a library and reading-room, and liquors are served incidentally: *Klein v. Livingston Club*, 177 Pa. St. 224, 55 Am. St. Rep. 717.

SMITH v. BELL.

[107 GEORGIA, 800.]

EXECUTIONS—AMENDMENT.—An execution, regular in all respects except that no person is named therein as plaintiff in the judgment upon which it is issued, is not absolutely void, but merely irregular, and the officer issuing may amend it by inserting the name of the plaintiff, and such amendment will not vitiate the levy.

EXECUTIONS—AMENDMENT.—Plaintiff in execution in a claim case cannot, as a matter of right, have the trial suspended in order to allow him to amend his execution. An application to that effect is addressed to the sound discretion of the presiding judge.

B. P. Bailey and J. F. Wall, for the plaintiff.

W. H. Beck and Bloodworth & Rutherford, for the defendant.

801 COBB, J. Castellaw & Colvin recovered a judgment at the February term, 1897, of a justice's court, against S. S. Kendrick. On February 4, 1897, the justice issued an execution against Kendrick, which followed the judgment in all respects, except that no person was named therein as plaintiff. Indorsed upon the execution was the number of the district, the names of the plaintiffs and defendant in the judgment, the amount of the principal and interest of the judgment, and a bill of costs. This execution was transferred by Castellaw & Colvin to J. E. Smith, and, after such transfer, was levied upon certain personal property to which a claim was interposed by J. B. Bell. When the case came on for trial in the superior court on appeal, Smith, the transferee, offered in evidence the execution above referred to. Upon objection being made to the same by the claimant, the transferee moved to amend it by inserting therein the name of Castellaw & Colvin as plaintiffs, and thus make the execution conform to the judgment. To this motion the claimant objected upon the ground that an execution issued by a justice of the peace could not be amended after it had

reached the superior court on appeal. This objection was sustained by the court and the motion to amend overruled, and this ruling is assigned as error. Smith then made a motion to allow the justice who issued the execution to amend the same by inserting therein the names of the plaintiffs in the judgment; such justice being present in court with his docket upon which the judgment above referred to appeared, and having been allowed to testify that the execution was issued on the judgment referred to, and that the name of the plaintiffs was omitted from the execution by a mistake on his part. To this motion the claimant also objected upon the ground that the execution was fatally defective and could not be amended in the superior court. The court sustained the objection and overruled the motion to amend; and this ruling is assigned as error. The court, then, on motion of claimant, excluded the execution and dismissed the levy; and this ruling is also assigned as error.

1. The question presented for determination in this case is, whether an execution, regular in all respects except that no ⁸⁰² person is named therein as plaintiff in the judgment upon which it was issued, is absolutely void, or merely irregular and hence amendable. We do not find any case decided by this court in which this exact question was passed upon. The code declares that "all executions must follow the judgment from which they issued, and describe the parties thereto as described in such judgment": Civ. Code, sec. 5417. There are numerous cases cited under the section just quoted, which establish the proposition that if there is some one named in the execution as plaintiff in the judgment, a misdescription in the name of the plaintiff will not invalidate the execution, when it can, with reasonable certainty, be ascertained from the terms of the execution that it was issued upon the judgment with which it is sought to connect it. It is also settled by a decision of this court that an execution in favor of an entirely different person from the one named in the judgment as plaintiff is void: *Underwood v. Harvey*, 106 Ga. 268. See in this connection, *Blanchard v. Blanchard*, 3 Ired. 105, 38 Am. Dec. 710. It is absolutely essential that the execution should be connected with the judgment; the latter being the only authority for the issuance of the former: 1 *Freeman on Executions*, sec. 43. Where, upon an inspection of the execution, enough appears upon its face to connect it with the judgment, a variance between the judgment and execution will not vitiate the latter; and this is the

reason at the foundation of the decisions above referred to, holding that a mere misdescription of the parties to an execution is not a fatal defect. Where the execution shows on its face that it is not connected in any way with the judgment and could not possibly be connected with it if the parties therein described are correctly named, such execution would be without authority and void. For this reason the ruling was made in *Underwood v. Harvey*, 106 Ga. 268, that a judgment duly entered in the name of the state would not support an execution issued in favor of a designated person who was not a party to the judgment. A judgment in favor of one person is certainly no authority for a process to issue in the name of another person; and such an execution being on its face entirely disconnected with the judgment offered to support it, cannot be shown to ⁸⁰³ have been in fact issued on such judgment, although it was so intended by the officer who issued it. An execution which is complete on its face cannot be shown to refer to a judgment other than one which would authorize such an execution to issue; and hence a perfect execution purporting to have been issued on a judgment in favor of one party can never be shown to have in fact issued upon a judgment in favor of another party. But such is not the case when the execution is incomplete. An imperfect execution may be made perfect by amendment. A perfect execution needs no amendment. It needs only the production of the judgment referred to therein, in order to show that it is of vital force. An execution issued by an officer having authority to issue the same, regular upon its face in all respects save that the name of the plaintiff in the judgment is omitted, may be amended by supplying the omission upon its being shown that a judgment was rendered in favor of such party for the amount specified in the execution. Such an execution is not materially variant from the judgment, but simply on account of the omission fails to connect itself with the judgment; and this may be done by parol. In such case, the parol evidence is not offered to change the parties to the execution and to make a paper purporting to have been issued on one judgment really an execution on another judgment, but it is offered to show that a paper incomplete on its face is really supported by a lawful judgment. When thus shown to have issued upon a valid judgment, the clerical omission could be cured by an appropriate amendment; and especially would this be true where upon the back of the execution is indorsed, in connection with the bill of costs which

the law requires to be there placed, the names of the parties to the judgment upon which the execution was issued: Civ. Code, sec. 5394. The omission referred to in the present case was a mistake or misprision of the officer issuing the execution, and could be cured by an appropriate amendment being made by him at any time that the same was called to his attention: Civ. Code, secs. 5115, 5125. And such an amendment would not, under the present law, cause the levy to fall: Civ. Code, sec. 5114.

The conclusion reached by us in the present case is supported ⁸⁰⁴ by the cases of *Porter v. Goodman*, 1 Cow. 413, and *McGuire v. Galligan*, 53 Mich. 453: See, also, 8 Ency. of Pl. & Pr. 418 et seq.; *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; 1 *Freeman on Executions*, sec. 43. A conclusion to the contrary was reached by the supreme court of Alabama in the case of *Cooper v. Jacobs*, 82 Ala. 411; but we think the better view is stated by the supreme courts of New York and Michigan in the cases cited, *supra*. There is nothing in the case of *Ramsey v. Cole*, 84 Ga. 147, in conflict with what is here ruled. That case was dealing with judgments and not executions. An irregular judgment can only be amended in term time by the court which rendered it, but the rule is otherwise as to incomplete executions. They may be amended at any time: Civ. Code, sec. 5115.

2. The application to amend the execution was made during the progress of the trial. The plaintiff in execution in a claim case cannot, as a matter of right, have the trial suspended in order to allow him to amend his execution, even though the justice of the peace who issued it may be in court with his docket, but such applications are addressed to the sound discretion of the presiding judge. In the present case the judge suspended the trial for the purpose of allowing the amendment to be made if it could be lawfully done, and then refused to allow the amendment, upon the ground that the execution was void and therefore not amendable. In this conclusion we think he erred.

Judgment reversed.

All the justices concurring.

EXECUTIONS—AMENDMENTS TO.—An execution issued without the official seal may be amended by order of the court requiring the clerk to affix the seal: *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84. In Texas, an execution cannot be amended, after a sale under it, by substitution of the true Christian name of the defendant in place of a name inserted by mistake: *Morris v. Balk-*

ham, 75 Tex. 111, 16 Am. St. Rep. 874; note to McKay v. Paris etc. Bank, 16 Am. St. Rep. 884.

EXECUTIONS.—AMENDMENTS TO EXECUTIONS are not granted as a matter of right; the granting of them rests in the sound discretion of the court: Note to Malone v. Samuel, 18 Am. Dec. 175.

McDOWELL v. McMURRIA.

[107 GEORGIA, 812.]

FRAUDULENT CONVEYANCES—EFFECT OF JUDGMENT.—If a conveyance of property is attacked by creditors of the grantor as being fraudulent and void as to them, for the reason that it was made to hinder, delay, and defraud them, and the grantor and grantee are made parties to the action, a judgment merely reciting that such deed is null and void for the reasons alleged, and that it be delivered up and canceled, must be construed as declaring the deed to be null and void as to the complaining creditors and not as determining the invalidity of the deed as between the parties thereto.

HOMESTEADS—FRAUDULENT CONVEYANCES.—A deed made to defraud creditors, though void as to them, is valid between the grantor and grantee, but the grantor cannot, after executing the conveyance, have the property set apart and exempted as a homestead.

R. H. Powell & Son and Harrison & Bryan, for the plaintiff in error.

813 **LITTLE, J.** The record under which this case is to be determined is very meager and imperfect, and it may be that we are not in full possession of the facts as they transpired on the hearing. So far as we are able to ascertain, it appears that A. I. McMurria & Son was a mercantile firm engaged in business; that the firm failed; that A. I. McMurria conveyed to A. G. McMurria, trustee for the children of the grantor, certain real and personal property in the county of Baker; that such conveyance was voluntary; that subsequently Everett-Ridley-Ragan Company and other creditors filed a bill against A. I. McMurria and C. C. McMurria, being the firm of A. I. McMurria & Son, and A. G. McMurria, trustee, attacking the deed made to the trustee as fraudulent and void against such creditors; that a decree was rendered in the superior court of Calhoun county, declaring that such deed was null and void, and decreeing and adjudging that said deed be delivered up to be canceled; that a receiver was appointed and directed to take charge of such real and personal property and sell the same for the benefit of

the creditors of A. I. McMurria & Son; that subsequently A. I. McMurria applied to the ordinary of Baker county to have a homestead and exemption set apart to him as the head of a family out of said property, and by the petition which is the foundation of the present case he sought to restrain the receiver from proceeding to sell said property and from turning him out of possession until the said application for homestead could be heard and determined by the ordinary. The receiver answered the petition, in the nature of a cross-bill, and, having set up the above facts, prayed that the ordinary be enjoined from further proceeding under the application for homestead. On the hearing, the judge of the superior court refused to enjoin the ordinary, and enjoined the receiver as prayed for in the petition. The receiver excepted, and we are to determine whether the court erred in granting the injunction. It is only ^{§14} necessary, for a proper determination of the case, that two questions should be considered: 1. What is a proper construction of the decree which declares the deed made by A. I. McMurria to A. G. McMurria, trustee, null and void? 2. Did such deed so divest the title of A. I. McMurria to the property as to prevent the setting apart of a homestead and exemption to him as the head of a family out of the same? The record does not contain a copy of the decree. It is, however, recited that it declared the deed to be null and void, and that it was adjudged that said deed be delivered into court and canceled. It is further recited that the proceeding under which such decree was rendered was a creditors' bill, and that the auditor to whom the case was referred reported that such deed was made to hinder, delay, and defraud creditors; and such report was undoubtedly the basis of the decree which was rendered. It will be noted that it was not only filed against the firm of McMurria & Son, the debtors, but also against the trustee to whom the land had been conveyed.

1. We know of no law which declares a conveyance made for the purpose of hindering, delaying, or defrauding creditors absolutely null and void. The provision of the statute, as will be hereafter more fully seen, is that such conveyance, when the intention of the grantor is known to the grantee, is fraudulent and void as to creditors. The proceedings taken to avoid this deed were by the creditors of the grantor; the object had in view was, of course, to subject the property to the claims of the complaining creditors; and when the decree declared that such deed was null and void and that it be delivered up and

canceled, in construing it reference must be had to the pleadings and purposes of the bill, to ascertain the meaning of the decree. The creditors who sought to have the deed invalidated were not concerned with the relation which the law established between the grantor and the grantee of the instrument, but their bill was filed and prosecuted alone for the purpose, so far as this record shows or intimates, of subjecting the property conveyed to the debts of McMurria & Son; and it was not, from anything which we can gather from the record, filed for otherwise testing the title to the land, nor in the interest of anyone, **815** save the creditors. Under proceedings above indicated, the court would not have had jurisdiction to declare such an instrument absolutely void, nor for canceling the same as to all persons. The object of the bill would have been accomplished and the powers of the court legally exercised by decreeing such deed to have been fraudulent and void as to the creditors who were plaintiffs in the petition; and, construing it in the light of the pleadings and allegations as given in the record, such is its true meaning and effect. The deed made by A. I. McMurria to A. G. McMurria, trustee, having been made to defraud creditors, was as to them null and void, and the decree is not to be construed to go further and change the legal relation of the parties to the deed of conveyance.

2. It may, however, be said that the provisions of section 2695 of the Civil Code, which is as follows: "The following acts by debtors shall be fraudulent in law against creditors and others, and as to them null and void, viz.: . . . 2. Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment, and execution, or contract of any description had or made with intention to delay or defraud creditors, and such intention known to the party taking," etc., contemplate and declare that such instruments shall be void as to other persons besides creditors, and that such words are broad enough to cover the parties to the instrument. A brief history of this section of the code will be sufficient to demonstrate that the parties to the instrument are not by law included in the use of the words. Prior to the adoption of the code of 1863, the validity of conveyances made to defraud creditors was determined by the act of 13 Elizabeth. When that code was adopted, however, such conveyances were declared null and void simply as to creditors: Code 1863, sec. 1954. The same restriction was made by section 1942 of the code of 1868, and by section 1952 of the code of 1873. While this provision of the

code of 1873 was in force, this court had under consideration the case of *Westmoreland v. Powell*, 59 Ga. 256. There, Powell sued Westmoreland to recover damages for a trespass. The suit resulted in a judgment in favor of Powell, and the execution issued thereon was levied on property conveyed by the defendant ⁸¹⁶ in the suit to Westmoreland, trustee, for the benefit of the wife and children of the grantor. A claim was interposed by the trustee, and it was contended that the deed made to the trustee, was made to hinder, delay, and defraud Powell; and the question arose whether Powell was such a creditor as rendered the deed made for that purpose void as to him. In considering that question, this court held that the statute of 13 Elizabeth was not repealed by section 1952 of the code of 1873, but that such statute was in force in this state. The statute of 13 Elizabeth (Schley's Digest, 214) declares that conveyances made for the purpose and with the intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, etc., are void. Following this decision, the compilers of the code of 1895 added to the section found in the code of 1882 the words "and others," thus making our present code read that such acts by debtors are fraudulent only against creditors and others, and as to them null and void. The term "and others," found in this section, simply means to include with creditors such persons, other than creditors, who have any rightful claim or demand against the grantor for which such person is entitled to have a judgment in any court of law or equity. A clear enunciation of the statute of 13 Elizabeth is, that such conveyances are void only as to such persons.

These being the provisions of our statute, and there being no rule of the common law which declared conveyances made to hinder or delay creditors void, it would seem scarcely necessary to cite authority to support the doctrine that such conveyances are not invalid between the parties to the instrument. Mr. Bump in his treatise on *Fraudulent Conveyances*, fourth edition, section 432, declares: "The statute was designed solely to protect the rights of creditors, and consequently it renders a fraudulent transfer void only as against them, and makes no provision whatever in regard to its effect between the parties." In section 433 of the same work, the author declares that: "A fraudulent transfer is good as against the grantor, his heirs, executors, administrators, parties claiming under him, and his agents, vendees, and grantees": See, also, *Bump on Fraudulent*

Conveyances, sec. 449. Our own court has ⁸¹⁷ recognized this well-established rule in a number of cases. In that of *Bush v. Rogan*, 65 Ga. 320, 38 Am. Rep. 785, it is held: "Though a deed be made to defraud creditors, neither the vendor nor those in privity with him will be allowed to set up this fact to defeat an action of ejectment brought by the vendee. The deed is good as between the parties thereto and those in privity with them, though void as to creditors": See, also, *Parrott v. Baker*, 82 Ga. 364; *Tufts v. Du Bignon*, 61 Ga. 322; *Fouche v. Brower*, 74 Ga. 251. Under our statute, a homestead could, on the application of *McMurria*, only be set apart for the benefit of his family out of his own property: Civ. Code, sec. 2828. Inasmuch, however, as, prior to his application, the title by his own voluntary act had passed out of him, it follows that such homestead could not legally be granted. This is true whether the deed of conveyance was made with a good or a fraudulent intent: *Cassell v. Williams*, 12 Ill. 387; *Sumner v. Sawtelle*, 8 Minn. 309; *Huey's Appeal*, 29 Pa. St. 219. In *In re Graham*, 2 Biss. 449, the court, ruling on this question, said: "In attempting to place his property beyond the reach of his creditors, he has placed his exemptions beyond his own reach." It follows, from what has been said, that the receiver should not have been restrained from the execution of the decree of the superior court of Calhoun county to sell the property, because of the application of *McMurria* for homestead. It was not necessary that an injunction should issue to restrain the ordinary from setting apart the homestead applied for. The presumption is, that the ordinary, in passing on the application, will do so according to law, and, in the exercise of the judicial power vested in him, would refuse to approve the application because of the want of a right in the applicant to have property set aside as a homestead for his family, to which he has no title.

Judgment reversed.

All the justices concurring.

FRAUDULENT CONVEYANCES—HOW FAR VALID.—A conveyance in fraud of creditors vests the title absolutely in the grantee and gives him a legal and perfect estate, except as to those persons actually defrauded: *Note to Whitworth v. Thomas*, 3 Am. St. Rep. 729; and, as to existing creditors, it is void only to the extent in which it may be necessary to deal with the estate for their satisfaction. Satisfy the creditors and the conveyance stands: *Campbell v. Whitson*, 68 Ill. 240, 18 Am. Rep. 553.

SNELLING v. AMERICAN FREEHOLD LAND AND MORTGAGE COMPANY.

[107 GEORGIA, 852.]

JUDGMENTS AGAINST TRUSTEES—CONCLUSIVENESS AGAINST BENEFICIARIES.—If plaintiff, knowing that a trust estate is not liable, brings suit for the purpose of charging the trust property with the payment of a debt for which the trustee alone is personally liable, the judgment rendered therein is not conclusive against the beneficiaries of the trust, unless they are *sui juris* and parties to the suit, or consent to the judgment. The conduct of plaintiff in such case is fraudulent.

HOMESTEADS—JUDGMENTS AGAINST.—If a creditor, knowing that his debtor is the head of a family occupying property as a homestead, brings an action to subject it to the payment of a debt for which such debtor alone is personally liable, the judgment rendered therein is not conclusive upon the beneficiaries of the homestead estate, unless they are *sui juris* and parties to the action, or consent to such judgment.

TRUSTS—JUDGMENTS AGAINST—COLLATERAL ATTACK.—A judgment, fraudulent and void as to the beneficiaries of a trust, can be attacked by them as such whenever it is sought to be enforced against them. It is not incumbent upon them to move to set aside such judgment within any given time.

Clarke & Harrison, for the plaintiffs.

W. C. Worrill and Harrison & Bryan, for the defendants.

852 COBB, J. Mrs. Snelling, in behalf of herself and as next friend of her minor children, filed a petition addressed to the superior court of Stewart county, alleging, in substance, as follows: The ⁸⁵³ plaintiffs are the wife and children of Z. Taylor Snelling, who, in December, 1885, had set apart out of his property a homestead for the benefit of petitioners. The homestead estate consisted of lands and included a tract of seventy-five acres described in the petition. After the homestead had been set apart, Snelling obtained a loan from the American Freehold Land and Mortgage Company for the principal sum of eight hundred dollars, and gave to the mortgage company a deed to the land set apart as a homestead, as security for the loan. Subsequently, the mortgage company brought suit against Snelling on the debt, and recovered a judgment against him. Execution issued on this judgment, and was levied on the lands embraced in the deed given to secure the debt. To this levy Snelling, as the head of a family, interposed a claim. The execution and claim were returned to the superior court of Stewart county, and there pended until the April term, 1895, when, by consent of the parties a verdict and judgment was

rendered, finding all the property levied on not subject, except the seventy-five acres of land above referred to, which was found subject to the execution. It is alleged that the petitioners were not parties to the verdict and judgment rendered in the claim case, and did not consent thereto, and that the rendition of the same was in violation of their rights under the laws of this state. The execution which is the foundation of the judgment last referred to is about to be enforced against the homestead property; and Snelling is not in a position to interpose a claim and stop the sale, by reason of the former claim and verdict and judgment against him. The prayers of the petition were, that the mortgage company, its agents and attorneys, and the sheriff be enjoined and restrained from further proceeding with the sale of the property or in any way attempting to enforce the execution against the property; that the verdict and judgment rendered in the claim case be declared to be of no binding force and effect as against petitioners; and that the property levied on be declared to be not subject to the execution proceeding against it. The petition was filed April 1, 1899. The defendants demurred to the petition, alleging as grounds of demurrer that the matters set up therein were *res adjudicata*, because the ⁸⁵⁴ plaintiffs were represented by Snelling as trustee for them on the trial of the claim case, and are concluded by the verdict and judgment in that case; and that the action is barred by the statute of limitations, more than three years having elapsed from the time of the rendition of the judgment to the date of the filing of the petition to set aside the judgment. The mortgage company answered, denying the plaintiffs' right to the relief prayed for. There was evidence introduced to the effect that the plaintiffs were not parties to the claim case in which the consent verdict was rendered; and also to the effect that the seventy-five acres in dispute was a part of the homestead estate. After considering the pleadings in the case and the evidence, the court passed an order denying the application for an injunction, and the plaintiffs excepted.

1. When property which has been set apart as a homestead is levied upon under an execution against the head of a family, founded upon a debt to the payment of which the homestead estate is not liable, the head of a family is such a trustee for the beneficiaries of the homestead that he may interpose a claim in their behalf and set up their rights under the homestead to have the property protected from sale: *Bartlett v. Russell*, 41 Ga. 196. When such a claim is interposed, the

head of the family represents the beneficiaries of the homestead to the same extent that any trustee would in such a case represent the beneficiaries of the trust. The general rule is, that those represented by the trustee would be bound by a judgment against him as such, although they were not parties to the proceeding in which the judgment was rendered: *Zimmerman v. Tucker*, 64 Ga. 432; *Barfield v. Jefferson*, 84 Ga. 609; *Wegman Piano Co. v. Irvine*, 107 Ga. 65, ante, p. 109. This rule, however, does not apply, if the plaintiff knowing that the trust estate is not liable nevertheless brings the suit for the purpose of charging the trust property with the payment of a debt for which the trustee is only personally liable; and in such cases, to render a judgment having that effect conclusive upon the beneficiaries of the trust, it must appear that they were sui juris and were parties to the suit, or consented to the judgment: *Meyer v. Butt*, 44 Ga. 468. In the case just cited Judge McCay ⁸⁵⁵ says: "And we think it may be laid down as a general rule, that a judgment against a trustee, in a suit where he is the sole defendant, and where the plaintiff is seeking to charge the trust estate with debt, contracted by the trustee, for his own benefit, is prima facie fraudulent. Being defendant in such a suit is foreign to the object of the trust, and this the plaintiff is bound to know. The interest of the trustee is with the plaintiff, and it is a perversion of the whole intent of the trust to permit his neglect, or his act, to bind the trust property for his own benefit." Applying this rule to the present case, we think the judgment finding the homestead property subject to the individual debt of the head of the family is prima facie not binding; and, before the property can be sold in satisfaction of that debt, it must be shown by the holder of the debt, independently of the judgment in the claim case, that his debt is a proper charge upon the homestead estate.

There is nothing in this ruling to conflict with the decision made in the case of *Wegman Piano Co. v. Irvine*, 107 Ga. 65, ante, p. 109. In that case a judgment by default was rendered against the head of a family, subjecting the property of the homestead estate to the payment of a debt which the creditor honestly claimed belonged to one of those classes of debts for the payment of which such an estate could be lawfully rendered liable, the averments in the petition being that the same was contracted by the head of the family for the benefit of the homestead estate, and that the consideration of the debt had inured to the benefit of the homestead estate. The petition in

that case did not disclose a palpable effort to charge the trust estate with the payment of the individual debt of the trustee, but, on the contrary, it was brought for the purpose of collecting out of the trust estate a debt alleged to have been contracted by the trustee bona fide for its benefit. After judgment was rendered, the head of the family filed a formal motion to set it aside upon various grounds, but none of them charged any fraud or collusion in the transaction, and all of them set up matters which should have been taken advantage of by demurrer or plea before judgment. The motion was, after a hearing, overruled. Subsequently, the beneficiaries filed a petition to enjoin a sale ⁸⁵⁶ under an execution issued on the judgment, upon practically the same grounds that had been set up in the motion to set aside the judgment, made by the head of the family; and it was held that the judgment rendered against the head of the family in the original case, as well as the judgment on the motion to set aside the judgment, concluded the beneficiaries from raising these points. If it had been alleged in terms that the debt claimed as chargeable against the homestead estate was not so chargeable but was really the individual debt of the head of the family, and that the suit and judgment was the result of a fraudulent and collusive arrangement between the trustee and his individual creditor to charge the trust property with the individual debt of the trustee, then the case would have been within the rule laid down in *Meyer v. Butt*, 44 Ga. 468. In the present case, the manifest object of the levy was to collect out of the trust estate a debt with the payment of which it was not chargeable. There could have been no other purpose on the part of the creditor. While the head of the family had a right, and it was probably his duty, to interpose a claim in behalf of the beneficiaries of the homestead, he had no power or authority to consent to a judgment which would have the effect of binding the trust estate to pay his individual debt. A judgment having this effect, rendered in such a case by consent of the trustee and his individual creditor was so foreign to all of the purposes of his trust as to be a nullity, on account of the gross fraud thus attempted to be perpetrated upon the beneficiaries of the trust by the collusive conduct of a faithless trustee and his individual creditor, who well knew of his utter disregard of duty as well as his want of power to do the act relied on to make the scheme effectual. The facts in the case cited supra, from 44 Georgia, conclusively show actual fraud on the part of the plaintiff, and as a result, there

must have been collusion between him and the trustee. While Judge McCay speaks of implied fraud, it could not have been otherwise than as just stated; for the creditor, who knew that the trust estate was not liable for the payment of his claim, but who, nevertheless, sought by a legal proceeding to collect the same from the trust property, was necessarily guilty of bad faith. That case ⁸⁵⁷ was, in our judgment, upon its facts rightly decided, and the principle upon which the decision rests is applicable to the case now in hand.

2. It is contended, however, that the injunction was properly refused, because it appeared from the face of the petition that more than three years had elapsed since the rendition of the judgment in the claim case, and that the suit of the plaintiffs was barred under section 3764 of the Civil Code, which declares that: "All proceedings of every kind in any court of this state, to set aside judgments or decrees of the courts, must be made within three years from the rendering of said judgments or decrees." We do not think that section applies to a case like the present one. The proceeding instituted by the plaintiffs in this case is not one to set aside a judgment. There is no prayer to this effect. If the allegations in the petition are true, the judgment was fraudulent and void as to them, and could be attacked by them as such whenever sought to be enforced against them. They were under no obligation to go into court within any given time and make a formal motion to set aside the judgment which had been procured through the fraud of their trustee and his creditor. We think that when this fraudulent and void judgment was sought to be enforced against them, they had a right to resist it, and such was the purpose of the proceeding instituted by them in the present case. They have a right to enjoin the execution issued on this judgment from proceeding against the homestead property; and it was not necessary to institute any proceeding to set aside the judgment on which it was issued. Such being the case, the section of the code is not applicable, and it was error to refuse the injunction on this ground.

Judgment reversed.

All the justices concurring.

HOMESTEADS—JUDGMENT AGAINST BINDS BENEFICIARIES.—A judgment against the head of a family in a suit to subject the homestead to the payment of a debt for which it is liable, or in a suit relating to the homestead, is binding upon the beneficiaries of the homestead as well as upon the head of the family, although they are not parties to the action, and is conclusive as to all of them: *Wegman Piano Co. v. Irvine*, 107 Ga. 65, ante, p. 109.

JUDGMENTS.—Collateral attacks upon judgments are carefully discussed in the note to *Morrill v. Morrill*, 23 Am. St. Rep. 103-119. Collateral attacks on judgments are not favored; only those void on their face can be assailed, either directly or indirectly, without reference to lapse of time; and a judgment cannot be collaterally attacked for fraud: Note to *Williams v. Haynes*, 19 Am. St. Rep. 755.

Judgments against Trustees—Conclusiveness against Beneficiaries.

The general rule is, that in all proceedings affecting the trust estate, whether brought by or against third persons, the trustee and cestui que trust are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein. Hence a judgment against the trustee alone, the beneficiary not being a party thereto, does not bind the latter as a general rule, and he, in an action that seeks to subject the trust estate to the satisfaction of that judgment, may contest the correctness of the judgment, and show that it is not enforceable against the trust property: *Roberts v. Yancey*, 94 Ky. 243, 42 Am. St. Rep. 357; *Numsen v. Lyon*, 87 Md. 31; *Lebeck v. Fort Payne Bank*, 115 Ala. 447, 67 Am. St. Rep. 51; *Collins v. Lofftus*, 10 Leigh, 5, 34 Am. Dec. 719; *Reed v. Reed*, 16 N. J. Eq. 248; *Martin v. Reed*, 30 Ind. 218; *Caldwell v. Taggart*, 4 Pet. 190; *Sprague v. Tyson*, 44 Ala. 338; *Clemons v. Elder*, 9 Iowa, 272; *Piatt v. Oliver*, 2 McLean, 267; *Prewett v. Land*, 36 Miss. 495; *Whelan v. Whelan*, 3 Cow. 537; *Helm v. Hardin*, 2 B. Mon. 231; *Schenck v. Ellingwood*, 3 Edw. Ch. 175; *Fish v. Howland*, 1 Paige, 20; *Stillwell v. McNeely*, 2 N. J. Eq. 305; *Dunn v. Seymour*, 11 N. J. Eq. 220.

If the beneficiaries of a trust are known to the plaintiff instituting a general creditors' suit against a trustee to subject his property to the payment of his debts, such beneficiaries must be made formal parties to such suit, in order to be bound by the judgment rendered therein: *Marshall v. Hall*, 42 W. Va. 641. Neither a judgment in an attachment suit against a trustee of corporate stock in which all of the stock standing in his name is attached by his creditor, nor another judgment in an action of interpleader brought by the administrator of a pledgee of such stock with whom it has been deposited upon release of the attachment as a pledge to await the result of the attachment suit, in which it is determined that the stock belongs to the estate of the trustee, subject to the debt of the creditor, can bind or estop the beneficial owner of the trust stock, who was not a party to either suit, and had no notice thereof, nor does the existence of such judgments without his knowledge tend to show laches on his part: *Hovey v. Bradbury*, 112 Cal. 620. In a suit to obtain relief against a mortgage held by a trustee, all of the beneficiaries must be made parties in order to be bound by the decree: *Clemons v. Elder*, 9 Iowa, 273.

A decree ordering a sale of property settled in trust for the benefit of a married woman and her minor children is subject to attack unless such children are made parties to the bill: *Prewett v. Land*, 36 Miss. 495. In a suit against a trustee to have a purchase made by him declared to be for the benefit of the trust estate, the beneficiaries are necessary parties: *Campbell v. Johnston*, 1 Sand. Ch. 148.

Although the trustees of an insolvent estate are the representatives of the creditors for the appropriation of the property of the insolvent toward the payment of their debts, they are not their privies in law, so that a creditor is bound by all the findings of the court in a suit between the trustees and another creditor as to the validity of the latter's claim against the estate: *Farrel v. National Shoe etc. Bank*, 43 Fed. Rep. 123; *Kimball v. Cannon*, 59 Mich. 290. However, a judgment against such trustees, who have sued for property embraced in the assignment, is binding upon the trustees and the creditors, unless it can be shown to have been the result of fraud and collusion: *Field v. Flanders*, 40 Ill. 470. In suits brought by trustees to clear the trust property from adverse claims, the cestuis que trust are necessary parties: *Blake v. Allman*, 5 Jones Eq. 407; *Reed v. Reed*, 16 N. J. Eq. 248.

The rule that in suits by or against trustees concerning the trust property, the beneficiaries are necessary parties in order to be bound has many exceptions, and is by no means arbitrarily enforced, but is controlled by convenience and necessity, with a just regard to the peculiar circumstances of each particular case. Thus, where there is a definite and fixed trust fund, in which each of the beneficiaries is entitled to a certain and aliquot part, distinct from the others, so that there is no common interest in the object of the bill, all of the cestuis que trust need not be joined in a suit involving only one individual share: *Caldwell v. Taggart*, 4 Pet. 202; *Platt v. Oliver*, 2 McLean, 307.

A trustee for a life tenant and remaindermen under the provisions of a will, who, in the proper exercise of a power conferred upon him by the will, executes a note and secures it by deed of trust of land, represents, in a suit brought for the collection of the note, both the life tenant and the remaindermen, and though they are not made parties to the suit, a judgment therein against him binds them all: *Henderson v. Williams*, 97 Ga. 709; *Cabot v. Armstrong*, 100 Ga. 438. The cestuis que trust of a mortgagee are not necessary parties to a foreclosure suit, whether such suit is to enforce the mortgage or to make it subordinate to some other lien, and a final decree settling the rights of all parties may be made without bringing such cestuis que trust before the court: *New Jersey Franklinite Co. v. Ames*, 12 N. J. Eq. 507; *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Willink v. Morris Canal Co.*, 4 N. J. Eq. 377. If one conveys certain mortgaged property to another in trust for the former's wife, and the mortgagee institutes suit against such trustee to foreclose, and the latter, answering, admits the facts to be as stated in the complaint, and consents to such decree as may be right, the trustee is authorized by the nature of his trust to represent the interests of the beneficiary to this extent, and, in the absence of proof of injury to her or her estate, she cannot be allowed to reverse nor to impeach such decree: *Johnson v. Robertson*, 31 Md. 476. In a foreclosure and sale of mortgaged premises by trustees, who hold the mortgage in trust to secure the holders of any or all notes secured thereby, each beneficiary must be presumed to have had full notice, both of the pendency of the action

and of all facts which appear upon the face of the proceedings, to indicate fraud or collusion, and cannot urge such facts as ground to review or to set aside the decree: *Glide v. Dwyer*, 83 Cal. 477. In such case, if the trustee who represents such beneficiaries is in court, the decree rendered binds them, in so far as it affects the trust property, in the absence of fraud: *Robertson v. Van Cleave*, 129 Ind. 217. An action to annul or set aside a deed of trust may be maintained against a trustee without the presence of the beneficiaries, and especially when such beneficiaries consist of many creditors who hold notes executed and delivered to the payee named in the deed, and negotiated by him before maturity to persons not described in the deed by name or by any classification: *Watkins v. Bryant*, 91 Cal. 492.

The head of a family may be regarded as a quasi trustee, in whom the law has reposed the duty of representing and protecting both his own interests and the interests of his family, and a judgment against him may therefore bind them. Thus, a judgment against the husband, who is the head of a family, occupying and claiming land as a homestead, may be conclusive on the wife and other members of the family: *Barfield v. Jefferson*, 84 Ga. 609; *Hightower v. Beall*, 66 Ga. 102.

In Missouri, either the trustee or the beneficiary may sue for the taking or damaging of trust property belonging to an express trust, and a judgment in an action by either the trustee or the beneficiary bars an action by the other: *Barton v. Martin*, 60 Mo. App. 351; *Chouteau v. Boughton*, 100 Mo. 406. The trustees of an express trust have the legal title to, and are the legal owners of, personal property belonging to the trust estate, and, in an action by such trustees against a stranger, alleged to have in his possession or to be liable to account for property belonging to the trust estate, to reduce such property to possession or to subject it to their control or for an accounting, unless the action involves and requires the determination of rights as between the beneficiaries themselves, or as between them and the trustees, it is not necessary to make them parties, and, in the absence of fraud or collusion, they are bound by the decree: *Estate of Straut*, 126 N. Y. 201.

If a demand upon the trust property exists before the creation of the trust, no necessity exists of joining the cestui que trust in a suit against the trustee to enforce such demand: *Platt v. Oliver*, 2 McLean, 307. Trustees for the payment of debts and legacies under a will may maintain suit without bringing the beneficiaries before the court: *Miles v. Davis*, 19 Mo. 408. An executor or trustee of a fund for the payment of creditors may maintain a bill for the purpose of obtaining directions, in reference to the execution and management of the trust without making the beneficiaries parties: *Coe v. Beckwith*, 31 Barb. 339; *Beal v. Crofton*, 5 Ga. 301.

"The general rule that, in an action in equity against a trustee for an accounting of the trust, the beneficiaries of the trust are necessary parties, is a rule of convenience for the protection of the trustee against further litigation at the instance of the omitted beneficiaries, and the objection to the absence of certain benefi-

aries as parties to such action does not go to the jurisdiction of the court over the subject matter of the action, and is waived by the trustee when not urged in the trial court; and a judgment in such action determining that a certain sum was then due to the trust from the trustee, without any appropriation or apportionment of funds among the beneficiaries, and which does not disclose on its face that the omitted beneficiaries were within the jurisdiction, is conclusive upon the trustee in a second action for an accounting in which all of the beneficiaries are parties, and in which the omitted parties in the former action have adopted and consented to the judgment fixing the amount due from the trustees at its date. The trustee cannot, in such second action, demand an accounting of the whole trust *de novo*; but only from the date of the former judgment": *Alison v. Goldtree*, 117 Cal. 545.

The principal exception to the general rule requiring all the *cestuis que trust* to be made parties in any proceeding affecting their interests, in order to bind them by the judgment therein, arises when such beneficiaries are very numerous and it would be impossible or extremely inconvenient to bring them all before the court. Under such circumstances, they need not all be made parties to the suit, and if a sufficient number join in the action, and a reasonable constructive notice be given to the others, the latter are considered as virtually represented in the proceedings, and are therefore bound by the final adjudication: *Platt v. Oliver*, 2 McLean, 267; *Kerr v. Blodgett*, 48 N. Y. 62; *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Egberts v. Wood*, 3 Paige, 517, 24 Am. Dec. 236; *Shaw v. Norfolk etc. R. R. Co.*, 5 Gray, 162; *Watkins v. Bryant*, 91 Cal. 492. The exception to the general rule was sustained in an action to foreclose a mortgage on land vested in trustees for the benefit of two hundred and fifty subscribers, without making the latter parties: *Van Vechten v. Terry*, 2 Johns. Ch. 197. The same rule was applied in an action against a trustee for the holders of three hundred and twenty railroad bonds, sued for the purpose of foreclosing a prior mortgage: *Board of Supervisors v. Mineral Point etc. R. R. Co.*, 24 Wis. 93-127.

Where property is conveyed to trustees to hold in trust for the purpose of securing the payment of bonds, coupons, or other evidences of indebtedness, the trustees represent the bondholders, and proceedings by or against such trustees, conducted in good faith, bind the holders of such evidence of indebtedness: *Beals v. Illinois etc. R. R. Co.*, 133 U. S. 290; *Kerrison v. Stewart*, 93 U. S. 155; *Shaw v. Railroad Co.*, 100 U. S. 605; *Richter v. Jerome*, 123 U. S. 233; *Glide v. Dwyer*, 83 Cal. 477. What number of beneficiaries is to be regarded as so great as to obviate the necessity of bringing them all into court remains undetermined. It is believed, however, that the beneficial interests of the *cestuis que trust* must be the same in order that a few may represent the whole number. Each case must depend upon its own peculiar circumstances: 1 *Freeman on Judgments*, sec. 173; 2 *Black on Judgments*, sec. 585; note to *Collins v. Loftus*, 34 Am. Dec. 723, 724.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

CONDON v. MUTUAL RESERVE ASSOCIATION.

[89 MARYLAND, 99.]

JURISDICTION — EXTRATERRITORIAL. — A legislature has no power to authorize a court to exercise extraterritorial jurisdiction, and a statute, however comprehensive, will not be construed as conferring such jurisdiction.

INSURANCE.—A POLICY-HOLDER IN A MUTUAL INSURANCE ASSOCIATION stands in a twofold relation toward the company. He is insurer and insured.

CORPORATIONS—FOREIGN—JURISDICTION.—A statute providing that lawful process, served upon an agent of a foreign corporation authorized to receive such service, shall be of the same force and validity as if served on the corporation within the state does not confer jurisdiction to regulate the management, the conduct, or the internal government of such foreign corporation.

CORPORATIONS—FOREIGN — STATUTE CONFERRING JURISDICTION.—A statute making a foreign corporation liable to a suit "on any dealings or transactions" had in the state is to provide for the enforcement of contracts made here by foreign corporations through their agents, but does not confer jurisdiction over the internal affairs of a foreign corporation.

CORPORATIONS—FOREIGN—JURISDICTION OVER INTERNAL MANAGEMENT.—Acts distinctively pertaining to the internal management of a foreign corporation will not be inquired into by the courts of a state, whatever the motives with which the acts are done, and the effect they may have upon others when done.

CORPORATIONS—FOREIGN—INTERNAL MANAGEMENT. Where the act complained of affects a party solely in his capacity as a member of the corporation, such action is the management of the internal affairs of the corporation, and, in case of a foreign corporation, the courts will not take jurisdiction.

CORPORATIONS — FOREIGN — JURISDICTION OVER. Where the act of a foreign corporation complained of affects a party's individual rights only, the courts of a state will take jurisdiction.

CORPORATIONS — FOREIGN — PLEADING—INTERNAL MANAGEMENT.—A complaint, alleging that excessive assessments levied by a foreign insurance company are illegal and void because, the condition of the death fund not demanding that they should be laid, they were made with the fraudulent purpose of forcing the complainant's policy to lapse, states facts relating to the internal management of such foreign corporation, and the courts of this state will not entertain jurisdiction of it.

CORPORATIONS—INJUNCTION AGAINST FOREIGN. The courts of a state cannot, by injunction, control the internal management of a corporation which is located beyond the reach of that process.

INSURANCE—CONTRACT OF.—The constitution and by-laws form part of the agreement of insurance, whether mentioned or not.

RECEIVERS—JURISDICTION.—If a court has no jurisdiction over the subject matter of a proceeding, it has no authority to appoint a receiver.

INSURANCE—MUTUAL—ASSESSMENTS paid by a member of a mutual assessment insurance company to meet death losses are not assets of the company.

INSURANCE—RESCISSION OF CONTRACT FOR MISTAKE.—The holder of an insurance policy is not entitled to have his policy canceled and to recover the premiums paid merely because he failed to understand the provisions of the policy, the constitution, and the by-laws.

John Prentiss Poe, Edgar H. Gans, and Alonzo M. Hurlock, for the appellants.

William Pinkney Whyte, Bernard Carter, and John M. Carter, for the appellee.

108 **McSHERRY, C. J.** The questions to be decided on this appeal arise on a demurrer interposed by the appellee to a bill in equity filed by the appellant in the circuit court of Baltimore City. The appellant is a resident of Maryland. The appellee is a corporation created under the laws of the state of New York and having its principal office there, though transacting business in Maryland. It is a mutual insurance company, formed on and conducting the co-operative, or assessment, plan. The appellant is a member of the body corporate, and holds one of its certificates of membership issued in 1884. By this certificate it is provided that "in consideration of the application for this certificate of membership"—the application being expressly made a part of the contract—and in consideration of the payment of certain dues and designated mortuary assessments falling due in February, April, June, August, October and December of each year, "or from such other periods as the board of directors may from time to time determine," the Mutual Reserve Association "does hereby receive

Levi Z. Condon as a member of said association." It is then stipulated that the association will, upon the death of Condon, during the continuance of the certificate and upon certain conditions, pay to his legal representatives the sum of ten thousand dollars "from the death fund of the association at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment to be made." The certificate further declares: "If, at such date as the board of directors of the association may from time to time fix or determine for making an assessment, the death fund is insufficient to meet existing claims by death, an assessment shall then be made upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates, according to the age of each member, as may be established by the said board of directors, and the net amount received from such assessment (less twenty-five per cent to ¹⁰⁰ be set apart for the reserve fund) shall go into the death fund." It is also provided that "the net earnings of the association, together with the twenty-five per cent of the net receipts from each assessment shall constitute a reserve fund"; and that "after the expiration of each period of five years, during the continuance of this certificate of membership, a bond will be issued for an equitable proportion of the reserve fund, and the principal of said bond shall be available ten years from its date toward paying future dues and assessments under this certificate." It is likewise declared that the contract shall be subject to all the provisions and stipulations contained in the constitution and by-laws of the association, "with the amendments made or that may hereafter be made thereto." And it is agreed that "the entire contract contained in this certificate and said application taken together, shall be governed by, subject to, and construed only according to the constitution, by-laws, and regulations of said association and the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." Upon the back of the certificate there is printed a "table of rates," containing, among other things, a statement that "the basis of the assessment rate for each member, according to the age taken at the nearest birthday, on each one thousand dollars, shall be as follows," and then the various ages from twenty-five to sixty-five are set forth and the several sums payable at the respective ages are placed opposite. Condon's age upon entering the as-

sociation was fifty-five, and the amount designated as the assessment upon each one thousand dollars at that age is three dollars and twenty-five cents. The appellant paid for some years six assessments annually, each of which amounted to thirty-two dollars and fifty cents. Subsequently, the assessment was increased to forty-eight dollars and fifty-five cents, then raised to forty-nine dollars and ten cents, and later on to seventy-five dollars and thirty cents. These sums were paid by Condon "with extreme reluctance." On February 1, ¹¹⁰ 1898, mortuary call No. 96 was issued, and by it the appellant was required to pay on or before March 3d the sum of one hundred and thirty dollars. He alleges that these assessments were enormously in excess of what he understood to be the meaning and effect of his contract with the appellee at the time he entered into it. By a written agreement, the time for the payment of the ninety-sixth assessment was extended first for thirty days from March 3d, and then for thirty days from April 2d. On the 29th of April, Condon filed a bill in equity against the appellee in the circuit court of Baltimore City; and on June 17th he filed an amended and supplemental bill. These are the bills now before us.

The bill, which was filed by Condon for himself and in behalf of others similarly situated who might come in and make themselves parties to the proceedings, after setting forth the facts already alluded to, proceeds to charge that the levying of the assessments in excess of three dollars and twenty-five cents per one thousand dollars of insurance and in excess of six per annum is a gross violation by the appellee of its contract with the appellant, and is both fraudulent and illegal; that the validity of this action cannot be maintained upon the ground that, by a strained interpretation of some of the conditions of the policy, the levying of assessments is remitted to the discretion of the officers, because the discretion referred to means the honest discretion of the corporation and its officers; that these assessments were not levied bona fide in the honest exercise of any discretion vested in the corporation or its officers, but were levied with the dishonest and fraudulent purpose of forcing the appellant and others situated as he is to allow their policies to lapse by a failure to pay illegal, ruinous, and fraudulent assessments.

The bill further charges that these increased assessments cannot be defended by the suggestion that the same are "to any extent" needed in order to enable the corporation ¹¹¹ to

meet its death claims, because, if the corporation is in the prosperous financial condition represented in its circulars, the levying of such assessments is a wanton abuse of the power it possesses and "plainly proves" that the same are illegal, fraudulent, and ultra vires. The bill then sets forth clauses 2 and 3 of the policy. It is under these clauses that a reserve fund is created out of the net earnings, plus twenty-five per cent of the net receipts from each assessment. By these clauses it is further provided that after five years a membership bond is to be issued to the policy-holder for an equitable proportion of this reserve fund; and this bond is made available after the expiration of ten years for the payment of future dues. The bill charges that the amount of the bonds issued to the appellant is greatly less than, according to the face of his policy, he was entitled to—that, in fact, the apportionment made was fraudulent—and that upon a true accounting it will be found that he is entitled to sums very much greater than those allowed him in the two bonds which had been issued to him. The bill also charges that the corporation is insolvent. The relief prayed is as follows: 1. For a subpoena; 2. That an injunction may be issued restraining the corporation from forfeiting the appellant's policy for the nonpayment of mortuary call No. 96, "and adjudging that the said assessment is fraudulent and void"; 3. That in the event of the policy being construed as conferring the right to make the assessment complained of, the policy may "be declared to have been obtained under such circumstances as demonstrated that there was no real meeting of minds," and that no contract was in fact executed; and therefore that the corporation may be decreed to refund to the appellant all the payments made by him to it from the beginning; 4. That if the court shall find that a binding contract was made, then that the contract, "as set out in said policy," in connection with the constitution and by-laws of the corporation, may be interpreted and the true meaning and effect thereof determined, and that the power ¹¹² of the corporation, in respect of the levying of assessments, may be settled and adjudicated; 5. That the corporation may be required to give a full and particular statement of its assets and liabilities; 6. That a receiver may be appointed to take charge of the assets within the jurisdiction of the court and to administer them under the direction of the court; 7. And for general relief. Other persons holding like policies became parties plaintiff. The defendant demurred to the bill and the amended

bill and assigned four grounds. The first, second, and third allege that the application for membership and the constitution and by-laws of the association, forming parts of the contract of insurance, are not exhibited with the bill, and that it is, therefore, impossible for the court to correctly interpret the contract. The fourth ground is in these words: "For that it appears by the bill of complaint in this case that the acts complained of on the part of the defendant affect the plaintiffs solely in their capacity as members of the said association, and that the said action relates altogether to the management of the internal affairs of the said association, which, as appears by the said bill of complaint, is not a corporation of the state of Maryland, but is a corporation of the state of New York, and therefore this court has no jurisdiction of the subject matter of the said bill of complaint."

The amended and supplemental bill reaffirmed all the allegations of the original bill, and prayed, in addition, that a further assessment maturing on July 1st be declared illegal and that an injunction be issued prohibiting the forfeiture of the policies because of its nonpayment. The demurrer distinctly challenges the court's jurisdiction to entertain the bill and to grant the relief sought. This issue of law thus raised we now proceed to consider.

By section 124, article 23, of the code, it is provided that, before a foreign insurance company can transact business in Maryland, it shall, amongst other things, file with the insurance commissioner of this state "a power of attorney ¹¹³ appointing a citizen of this state, resident within this state, the agent or attorney for the company, upon whom process of law can be served; there must also be filed with the insurance commissioner a certified copy of the vote or resolution of the directors appointing such attorney, which appointment shall continue until another attorney be substituted. And said writing or power of attorney shall stipulate and agree, on the part of the company making the same, that any lawful process against said company, which is served on said agent, shall be of the same legal force and validity as if served on such company or association within this state; and, also, that in case of the death or absence of the attorney so appointed, service of process may be made upon the insurance commissioner of this state; and such power of attorney cannot be revoked or modified (except that a new one may be substituted) so long as any policy or liability remains outstanding against such company

in this state. The term 'process,' used above, shall be held and deemed to include any writ, summons, or order, whereby any action, suit, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceedings, by any court, officer, or magistrate."

Broad and comprehensive as this statute is, it obviously does not confer unlimited jurisdiction on Maryland courts over foreign corporations. The language of an enactment does not always, or necessarily, measure its scope, or mark the limits of its action. And so, on the other hand, it is equally true that things apparently within its words may be actually beyond its operation. If they are, it is not to be assumed that the legislature intended to include them; and if there be no intent to include them they are outside of its purview. That which the legislature has no power to authorize a Maryland court to do, that is, to exercise extraterritorial jurisdiction, will not be held as included within the jurisdiction really given, even though the latter may be conferred in such general terms as to apparently embrace the former within the letter of the statute.

¹¹⁴ A policy-holder in a mutual insurance association stands in a twofold relation toward the company. He is a policy-holder and he is a member. Growing out of this, as well as altogether apart from it, there may be a distinct relation of creditor, but with this latter we are not now concerned. He is alike insurer and insured, but in both capacities he is a member; and it is solely because he is a member that he occupies either of these positions. His liabilities as insurer and his rights as insured depend wholly upon the obligations and the conditions of his membership. Those obligations and conditions are evidenced by the constitution and the by-laws of the association and by his application for, and his certificate of, membership, and by the law of the place of the contract. Apart from these there is nothing by which his duties and his rights as a member are to be determined. Rights as an insured he undoubtedly has. Those rights may be unlawfully invaded. If invaded, he is not without redress when he seeks relief in the forum having jurisdiction over the parties and the subject matter. The mere fact that he is a member of the corporation does not preclude him from asserting against the corporation any right arising out of his contract; but the character of the remedy invoked may measure the limits of the jurisdiction of the tribunal appealed to, when the domicile of the corporation is considered. It is, therefore, entirely possible that a state of

facts which would authorize a court in the exercise of its visitatorial power to inquire into the validity of acts affecting the rights of a policy-holder, when done by a corporation located within the jurisdiction of the court, would, as respects a foreign corporation, be wholly insufficient to confer upon the same court jurisdiction to act at all. Thus in *Rosenberger v. Washington Mut. Ins. Co.*, 87 Pa. St. 207, a domestic fire insurance company was sued for the amount claimed to be payable on a policy against loss by fire. The company was a mutual association. An assessment upon all the policy-holders had been levied some time prior to the loss, but it was alleged by the plaintiffs to ¹¹⁵ be excessive and therefore illegal, and they refused to pay it. When the loss insured against by the plaintiffs' policy occurred, the company insisted that the policy had been annulled because of the nonpayment of the assessment. Suit was brought to recover on the policy, and it was held that the question as to whether the assessment was excessive ought to have been left to the jury. Speaking for the court Judge Trunkly said: "By the terms of the charter the plaintiffs submitted themselves to the acts of the managers as representatives of all the members. They were bound by the assessment unless they can show fraud or gross mistake." The members "are, as members, subject to liabilities and entitled to privileges. A member may participate in its benefits, is presumed to know its rules and regulations, its books are evidence against him, and he shall bear his proportion of burdens. His corporate rights may be subject to the control of the corporation, but his rights as a party insured rest on the contract. Assurer and assured alike are bound by the charter—neither can do what it does not authorize." The company was located within the jurisdiction of the court, was subject to its visitatorial power, and it was held, in these circumstances, that evidence tending to show fraud in the levying of the assessment was competent, because, if the assessment was, in fact, fraudulent, it was illegal, and, if illegal, its nonpayment furnished no ground for declaring the policy forfeited. But we have no such state of facts to deal with in the pending case. This litigation was not instituted to recover on the policy a sum payable under it for a loss actually sustained. Its object, as will be shown later on, is to regulate, by a decree of the circuit court of Baltimore City, the management, the conduct, and the internal government of a foreign corporation. And the question is, Does the statute, section 124 of article 23 of the code, already cited, in-

clude such a proceeding or confer jurisdiction to entertain such a bill as we have now before us? This question must be answered in the negative, and it must be so answered both upon principle and according to precedent.

¹¹⁶ If we turn for a moment to sections 295 and 297 of article 23 of the code, it will be found that provision is there made in terms quite as broad as, if not broader than, those used in section 124, for subjecting to suits in this state all corporations not chartered by the laws of Maryland. Such corporations transacting business in this state are deemed to hold and exercise franchises within the state, and are made liable to suit "on any dealings or transactions" had in the state. Such suits may be brought in any court of the state or before a justice of the peace "by a resident of this state for any cause of action," and by a nonresident, when the cause of action has arisen or the subject of the action shall be situated in this state. The scope of these provisions has been defined by this court. In *North State etc. Min. Co. v. Field*, 64 Md. 151, it appeared that the appellee was a citizen of Maryland, and the appellant was a corporation created by the laws of North Carolina. The proceeding was an application for a mandamus. Field claimed to be a stockholder in the North State Company. He alleged that the directors of the company had made an illegal and invalid assessment upon each stockholder and had then forfeited his stock for the nonpayment of that assessment. He sought to be reinstated as a stockholder. After quoting the sections of the act of 1868, chapter 471, which are incorporated in the sections of the code just above alluded to, this court said: "The object of our statute, and of similar statutes passed by other states, is to provide for the collection of debts due from foreign corporations to our own citizens, and to enforce contracts made here by foreign corporations through its agents, and to protect our citizens from frauds or wrongs, whether the wrongdoer be foreign or domestic. But it was not the intent of our statute to give our courts jurisdiction over the internal affairs of a foreign corporation. Our courts possess no visitatorial power over them, and can enforce no forfeiture of charter for violation of law, or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the ¹¹⁷ by-laws, nor the relations between the corporation and its members, arising out of, and depending upon, the law of its creation. These powers belong only to the state which created the corporation." The case of *Wilkins v. Thorne*, 60 Md. 253, is like-

wise in point. Thorne filed a bill against Wilkins alleging that Thorne was a stockholder in the North State Copper and Gold Mining Company; that Wilkins and others, fraudulently contriving and intending to get possession of the company's property and divide the same amongst themselves, to the exclusion of the lawful owners of the stock, assembled in Baltimore and proceeded to take steps to reorganize the company, intending thereby to cheat and defraud Thorne and the other lawful holders of the stock out of their property by means of certain pretended by-laws, rules, and regulations; that Wilkins and his confederates were in actual possession of the property and franchises of the company, and had refused to allow any of the stockholders who had not paid an unlawful assessment levied by him and his confederates to have any lot, share, recognition, or authority in the matter of the corporation. The bill prayed for an injunction to restrain Wilkins and those acting with him from intermeddling with the property, stock, or affairs of the company. The corporation was a foreign corporation. This court, whilst holding that, "if this were a Maryland corporation, there could be no question as to the jurisdiction of a Maryland court over the subject," decided that "such controversies must be determined by the courts of the state by which the corporation was created"; because it was "clearly a controversy relating to the internal management of the corporation and the validity of the acts of those who claim to be, and indeed are admitted to be *de facto*, its president, directors, and stockholders." The relief sought was accordingly denied.

The conclusion reached in both of these cases was adverse to the court's jurisdiction, notwithstanding the provision of the statute making a foreign corporation liable to a suit in the courts of this state by a resident of this state ¹¹⁸ "on any dealings or transactions," or for "any cause of action"; and in spite of the fact that in one case the foundation of the proceeding was an alleged, and as the case was presented an admitted, illegal forfeiture of stock; and in the other an alleged, and by the demurrer a conceded, fraudulent conspiracy to deprive a bona fide shareholder of his stock and to exclude him from a vote in the management of the company. The language of section 124, heretofore quoted, is less—or at all events certainly not more—emphatic than that employed in sections 295 and 297; for it makes only lawful process served on a nonresident insurance company's agent of the same force and validity as if served on the company within the state. As process, to be

lawful, must be process that the tribunal issuing it has authority to issue, and as a judicial tribunal has no authority to issue process (which is a mandate to its officer commanding him to perform certain services within his official cognizance), unless it be issued in a proceeding which the court has jurisdiction to entertain, to hear, and to decide, it follows that the statute must be interpreted in the same way that sections 295 and 297 were construed—that is, as not intending to confer an extra-territorial jurisdiction, or a jurisdiction over a cause that involves only an inquiry into and the exercise of a control over the internal management of a foreign corporation.

The reasons for thus interpreting these provisions of the code are conspicuously clear. There are obvious difficulties that would be encountered if the courts of one state undertook to adjust the internal affairs of a foreign corporation formed under the laws of a different state and having its habitat within the borders of another sovereignty. The absence of a visitatorial power over such a corporation, and the absolute inability to enforce a forfeiture of its charter for a violation of the law, or to remove its officers for misconduct, or to punish them for malversations committed in the place of its domicile, are open and apparent obstacles in the court's pathway, should it assume to exert an extraterritorial ¹¹⁹ jurisdiction. Besides all this, its lack of the means to do full justice, and its want of the machinery to enforce against the corporation, in the place of its existence, any decree it might render in such a proceeding indicate, if they do not demonstrate, that the legislature never designed to confer a power, the exercise of which would or might be utterly fruitless and vain.

With this limit to the court's jurisdiction established, it becomes necessary to ascertain what is and what is not a controversy relating solely to the internal management of a corporation. In other words, what acts are so distinctively acts pertaining to the internal management of a foreign corporation as to preclude an inquiry into them by any tribunal other than the courts of the corporation's domicile. The motives with which the acts are done, and the effect they may have upon others when done, are altogether aside from the inquiry; because, if they strictly appertain to the internal government of the corporation, neither motive nor effect can convert them from what they intrinsically are into what they obviously are not; and, therefore, cannot make them cognizable if otherwise they be not cognizable. An act done with a fraudulent motive is, as

an act, precisely identical with the same act done without such a motive, in so far as it relates to this jurisdictional question, because it is the quality or nature of the act, and not the incentive that prompted it, or the effect that it produces, which determines whether it does pertain to the internal management of the corporation or not. In *North State etc. Co. v. Field*, 64 Md. 151, which has been followed by many other courts of the country, it was said: "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, our courts will not take jurisdiction. Where, ¹²⁰ however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction." In *North State etc. Co. v. Field*, 64 Md. 151, the controversy arose entirely out of the internal management of the affairs of the company. "It is the complaint of a stockholder that he has been deprived of his rights, as a stockholder, by the illegal action of the board of directors." In *Wilkins v. Thorne*, 60 Md. 253, it was the complaint of a stockholder that he was deprived of his right to the stock by the fraudulent conduct of persons claiming to be the directors. In *Madden v. Pennsylvania Electric Light Co.*, 181 Pa. St. 617, it was held that the court would not, at the suit of a resident stockholder against a foreign corporation, set aside unwise, dishonest, and useless contracts which depreciated and destroyed the value of the stock, although the visible, tangible property of the corporation, consisting of conduits in streets for electric lighting, was within the state; because the wrong complained of was an act done in the internal management of the corporation. In *Clark v. Mutual etc. Life Assn.*, Court of Appeals, District of Columbia, February 7, 1899, it was held that this same corporation was not amenable to the process of the courts of the district, under a bill substantially the same as the one before us, and seeking precisely the relief asked in this proceeding. See, too, 8 Am. & Eng. Ency. of Law, 378, note 4, 379, note 1; *Republican etc. Mines v. Brown*, 58 Fed. Rep. 645.

We turn now to the allegations of the bill to ascertain whether the acts complained of are, according to the definition in Field's case, acts of internal management or not. Laying aside for

the moment the question as to whether the certificate of membership by its terms authorizes an increase in the amount of the assessments above three dollars and twenty-five cents per one thousand dollars of insurance and permits the levying of more than the designated bi-monthly ones, it is obvious, we think, that the whole fabric of the bill with respect to these alleged illegal assessments involves, as ¹²¹ its foundation, the right of a Maryland court to inquire into the internal management of this New York corporation. The substance of the allegations of the bill, as we have heretofore stated them on this subject, is that these excessive assessments are not only void because not authorized, but because the condition of the death fund not demanding that they should be laid, they were made with the dishonest and fraudulent purpose of forcing the appellant's policy, and the policies of others similarly situated, to lapse. Now, it is perfectly apparent that no tribunal can possibly decide whether the condition of the death fund required these extra assessments to be levied, until it knows what the condition of the death fund was and what demands there were upon it. And it is equally clear that, in order that these factors may be known, the whole internal management of the association must be investigated. The disposition made of the money assessed for and payable to the death fund; the validity of claims against that fund; the propriety of expenditures charged against it, and other like inquiries, strictly relating to the internal management and to the proper disbursement of the money which the many thousand members have intrusted to the directors' control, would all have to be solved, before a court could say that these assessments were unnecessary or fraudulent. No court could declare them excessive until it knew what sum was not excessive; and no court could decide what sum was not excessive until it was placed in the full possession of all the facts pertaining to the whole internal conduct of the company. These observations apply also to the charges of the bill in respect to the amount of the reserve fund bonds issued to Condon. It is alleged that a true accounting will show him entitled to bonds for larger amounts. A true accounting can only be had by an examination of all the entries relating to this fund and by correcting errors, if any there are. Obviously, this would involve a control of the company's internal affairs by the agency of an injunction issued by a Maryland court, though that court possesses no ¹²² power to enforce the injunction if its commands were treated with contumely by the corporation. These

matters thus complained of do not affect the appellant's individual rights solely; they relate also to the rights and bear upon the liabilities of every other member as an insurer, and whilst, in a sense, they may, by their consequences, affect him individually as assured, they do not affect him exclusively, but concern, as well, the internal management of the company. His relation to the corporation is, as we have stated, of a twofold character. He is insurer and insured. It is possible that the same act of the body corporate may affect both of these relations. In that event it could not be said that the act affected a member's individual rights only. In *Madden v. Pennsylvania etc. Light Co.*, 181 Pa. St. 617, the fraudulent and dishonest contracts complained of impaired the value of the shareholders' stock, and in that regard injured his individual rights; but the wrong imputed arose, not from the violation of a contract with him, but from want of fidelity to duty on the part of the directors in the fiduciary position occupied by them. These acts not only depressed the value of the stock, but they concerned the internal management of the corporation, and, therefore, though causing injury, furnished no ground for a Pennsylvania court to interfere with the government of a New Jersey corporation.

If the whole of the contract between Condon and the company were before us for construction in a case where we were authorized to construe it, we would be confronted by a provision of the policy which places in the directors' power and discretion, when the death fund is insufficient to meet existing claims by death, to levy an assessment "at such rates, according to the age of each member, as may be established by the board of directors." Here, then, by this term of the contract, provision is made for additional assessments beyond the bi-monthly ones previously specified in the certificate. Whether this is the meaning of the contract when all of its parts are brought together we do not, for we cannot, now decide.

¹²³ From what we have said it is apparent that the second and fifth prayers for relief cannot be granted—we cannot by injunction control the internal management of a corporation which is located beyond the reach of that process. It is equally clear that the fourth prayer for relief must be denied, because it asks for the construction of a contract when but part of the contract is before us. We are called on to interpret the contract as set out in the certificate of membership in connection with the constitution and laws, though the application and the constitution and laws—all forming part of the contract—are not

before us. The constitution and by-laws form part of the agreement of insurance whether mentioned or not: 16 Am. & Eng. Ency. of Law, 41, and cases in note 1. A construction of the contract as set out in the policy alone would not be a construction of the contract as contained in the application, the constitution, the by-laws, and the policy.

There is no averment cognizable by a Maryland court justifying the appointment of a receiver as asked for in the sixth prayer for relief. The allegation of insolvency is not sufficient to found such a drastic measure on. Unless the plaintiff has a standing in court—unless he presents on the face of his bill a case of which jurisdiction can be taken—a bare allegation of insolvency will not warrant the appointment of a receiver. If the court has no jurisdiction over the subject matter of the proceeding it has no authority to appoint a receiver.

The second prayer for relief is in the alternative. It asks that the money paid in by Condon during the time he has been a member be restored to him, if the court should hold that his understanding of the meaning of the policy is not its correct interpretation. He alleges that he understood the contract to mean one thing, and he claims, if the court shall find it to import something else, that then there never was any contract at all, because there was no meeting of minds in regard to its terms. Now, the bill nowhere charges that Condon was induced by fraud, deceit, or ¹²⁴ misrepresentation to enter into the contract of insurance; nor does he ask to have the policy canceled on any such ground. His claim is simply that he understood the contract to signify that he was to pay only six assessments per annum, each one of which would be for the sum of thirty-two dollars and fifty cents, and no more. He insists that if this is not the limit of his liability he is entitled to have his money refunded. For more than fourteen years the policy has been in his possession. Its provisions were plainly before his eyes. He has given no explanation for not reading them; and although he has had the benefit of an insurance on his life for that period of time, he asks to have all he has paid in refunded him. The sums he paid in were not paid for his use exclusively, nor mainly. They were collected to pay the losses occasioned by the deaths of other members. They were paid in for a specific purpose and were paid by him as an insurer. They were not assets of the corporation: May on Insurance, sec. 550a and note. The corporation acted in the receipt of them as a collecting agency for the benefit of those persons to whom they

were ultimately payable; and there is no pretense in the bill that a single dollar of the sums paid in by Condon has not been disbursed or appropriated precisely in the way and to the uses he expected and intended that it should be. And, if his contributions have been expended and appropriated in that way, obviously he has no claim to recover them back, simply because he failed to read, or, if he read, failed to understand the provisions of the policy, the constitution, and the by-laws. As we have already stated, the whole contract is not before us; and, even if this were a case in which we were authorized to construe it, we could not interpret it in the absence of material and essential portions of it.

Every right asserted by Condon is a right founded on his membership. Every prayer for relief is for relief sought by a member against the concern of which he is a member, in respect of some matter pertaining to the management ¹²⁵ and internal government of the association. Whilst the acts complained of may affect him, they do not affect him alone, and they only affect him in any way because of his membership. If these acts are unwarranted, they are certainly not more grave than the forfeiture of Field's stock for the nonpayment of an illegal and void assessment. And if the latter gave no ground for the interposition of a court of equity, because it was an act of internal management done by a foreign corporation, it is difficult to see how the former can be classed as acts affecting only the individual rights of Condon. In *North State etc. Co. v. Field*, 64 Md. 151, an injury was done to him by the misconduct complained of, but the injury was not an injury solely to his individual rights. The act which occasioned the wrong was a corporate act relating to the internal government of the company. Its effect upon him did not deprive it of its character as a corporate act. The results to Condon do not define the nature of the acts which he complains of, or prevent them, because they do him injury, as he alleges, from being acts pertaining to the internal government of a foreign corporation of which he is a member. Were he suing on the contract of insurance the situation would be different.

If this were a suit on the insurance policy to recover a loss insured against, it would be a case within the jurisdiction of the courts of Maryland. In such a proceeding it would be incumbent on the court to construe the policy, and to determine whether it had been forfeited or not, because it would have the authority to decide whether a recovery could be had. Neces-

sarily, therefore, the validity of any assessment, and the inquiry as to whether an assessment was fraudulent, would be a legitimate inquiry, because, in a suit on the policy in Maryland, the courts of this state would not be called on to regulate, by injunction or otherwise, the government of a foreign corporation, but would be required merely to enforce the contract or to award damages for its breach. There is a broad difference between compelling a foreign corporation, at the suit of a member, ¹²⁶ to conform its internal conduct to the views of a Maryland court, and adjudging, at the suit of a beneficiary, that it is liable in damages for a failure to comply with its contract of indemnity. In the one instance the Maryland court has no jurisdiction; in the other it has.

As we agree with the conclusion reached by the circuit court, its decree sustaining the demurrer and dismissing the original and amended bills will be affirmed.

Decree affirmed with costs in this court and in the court below.

JURISDICTION—EXTRATERRITORIAL.—An attempt by the legislature of a state or nation to grant jurisdiction to its courts of persons or property not within its territory, is regarded elsewhere as usurpation, and all judicial proceedings in virtue thereof are void: *Latimer v. Union Pac. R. R.*, 43 Mo. 105, 97 Am. Dec. 378.

INSURANCE—CONTRACT OF.—The charter of a beneficial association is a part of the contract of insurance, the same as though written therein: *Supreme Lodge K. of P. v. Stein*, 75 Miss. 107, 65 Am. St. Rep. 589; so, too, are its constitution and by-laws: *Sourwine v. Supreme Lodge K. of P.*, 12 Ind. App. 447, 54 Am. St. Rep. 532.

INSURANCE, LIFE—RECOVERY OF PREMIUMS.—The liability of an insurance company for a return of premiums depends upon whether the policy has become a binding contract between the parties. If it has, and the risk has commenced, no action lies for the recovery of premiums paid: *Mailhoit v. Metropolitan Life Ins. Co.*, 87 Me. 374, 47 Am. St. Rep. 336.

CORPORATIONS.—A FOREIGN CORPORATION subjects itself to the jurisdiction of the courts of a state in which it does business, to the extent that it must submit to their jurisdiction any controversy arising out of the business so done: *Note to De La Montanya v. De La Montanya*, 53 Am. St. Rep. 182.

RECEIVERS—POWER TO APPOINT.—The courts of one state may appoint a receiver for a foreign corporation doing business therein and having property there, but they have no such power of appointment if the corporation has no property in the state of the appointing court, and has not appeared or been served with process, and none of its officers or agents are to be found in the state: *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917.

INSURANCE—RELATION OF POLICY-HOLDERS TO EACH OTHER.—In mutual insurance companies it is necessary and equitable that each person who gets insured in them should become subject to the same obligations toward his associates that he requires from them toward himself: *Note to Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 544.

CREAMER v. McILVAIN.

[89 MARYLAND, 343.]

ANIMALS—DISPOSITION OF.—The mere running away of horses when colts, the cause of which is explained, is not evidence of a disposition to run away.

NEGLIGENCE—PRESUMPTION FROM RUNAWAY.—No presumption of defendant's negligence can be legitimately drawn from the mere fact that horses driven by him ran away and caused an injury.

NEGLIGENCE—DRIVING HORSES—PRESUMPTION.—Negligence cannot be inferred from the fact that a driver does not discontinue a drive when his horses, which had previously been gentle and easily managed, showed signs of being unruly.

George Savage, W. Cabell Bruce, and William R. Barnes, for the appellant.

Edgar H. Gans, Vernon Cook, and B. H. Haman, for the appellees.

349 **BOYD, J.** The appellants sued the appellees for injuries sustained by Mrs. Creamer as the result of the horses, drawing a vehicle occupied by the appellees, running into one in which the appellants were riding. There are two counts in the declaration—the first alleging that “the defendants, because of their negligence and incompetency to properly drive horses, so negligently and unskillfully managed a team, by which they were being conveyed in the same direction, that said team struck the vehicle in which the plaintiffs were seated,” and the second, that “a vehicle under the management of the defendants, and drawn by two horses, which the defendants knew to be prone to become uncontrollable and to run away, ran into and struck the vehicle in which the plaintiffs were seated, with great violence, said horses having become uncontrollable, and ran away because of their proneness to become uncontrollable.” At the trial of the case the court below granted two prayers—the first in substance instructing the jury that there was no evidence legally sufficient to entitle the plaintiffs to recover under the first count, and the second being to the same effect as to the second count. Having stated the two grounds for recovery relied on by the plaintiffs, we will consider them in the order they are presented in the declaration.

1. The evidence shows that Mr. Kemp was the owner of the horses and the vehicle, in which he and Mr. McIlvain were riding. They had been taking a drive and were returning to the city of Baltimore by way of the Pialico road. Mr. Kemp drove

until they reached a house on the roadside, known as "Halstead's," where they determined to ³⁵⁰ stop. Before reaching Halstead's, from the direction they were coming, the road on the right was made of soft dirt, the middle being macadamized, and there being an electric railway on the other side. There was some difference of opinion between the witnesses as to the speed of the horses as they approached and drove into Halstead's, but the evidence on the part of the plaintiffs was, for the most part, to the effect that they were moving very rapidly—so much so that some of the witnesses thought that at least one of them was running as they turned into that place. The testimony of several was that Mr. Kemp, who was driving at the time, lost control of the horses and dropped one of the lines, and although that was denied by the appellees, who undertook to explain how one of the lines came off Mr. Kemp's hands, it may well be conceded that if the injury complained of had happened as they approached or drove into Halstead's, the alleged negligence of the appellees—certainly of Mr. Kemp—would necessarily have been a question for the consideration of the jury. For, although it is shown that it is customary for those driving fast or spirited horses to "speed" them on that dirt road, it is a part of the public road, and if persons drive at such rate as the testimony shows these parties were driving on the road and as they went into Halstead's, which is a place of public resort, it would not have been within the province of the court to say that there was no evidence of negligence, if a collision had occurred by reason of such fast driving at those points, as is disclosed by the record. But the accident did not happen there. The appellees, after having had their horses taken in charge by the hostler, went into the house and remained there some time. Mr. Creamer said he and his wife remained there probably five minutes after the appellees arrived; that they then drove a short distance out the road when they turned and drove toward the city. Mr. Kemp testified they stayed there "some little time" before starting, and Mr. McIlvain said he supposed it was ten or fifteen minutes. When they started Mr. McIlvain drove, according ³⁵¹ to the evidence of Mr. Kemp and himself, because the former was not well and was suffering from a pain in his side. After going down the road about a half mile, one of the horses became frightened at an electric-car, which was making an unusual noise, and jumped against the other horse and the two started to run. When they were about three-quarters of a mile from Halstead's they ran into the vehicle which the appellants were driving, which caused the injury

complained of. From the time they left Halstead's there is not a particle of evidence of negligence on their part. It is true that one of the witnesses for the plaintiff said, in speaking of their leaving Halstead's, that: "They went off in a kind of a flurry." Just what he meant by that is not very clear, but, in speaking of the way they came into Halstead's, the same witness said "they came in with a little flurry, that is a little extra," but he also said, "I don't think they came at a very fast rate of speed; as far as the rate of speed they came in is concerned, they came in as a pair of spirited horses," but his opinion was that they did not know "how to handle horses." Mr. McIlvain said, "I drove from Halstead's and they acted very gentle with me." Although some of plaintiff's witnesses thought that the horses were not properly managed as they entered Halstead's, the uncontradicted testimony shows that at that time Mr. Kemp was driving, whilst Mr. McIlvain drove after they left that place and was driving when the accident happened. Nor was it attempted to be denied that Mr. McIlvain had been driving horses constantly for ten or twelve years, and had frequently driven those which caused this accident. No evidence was offered even tending to prove that either Mr. Kemp or Mr. McIlvain was not a competent driver, excepting the opinions of some of the witnesses formed from the manner in which the horses were managed as Mr. Kemp drove into Halstead's, and one of the plaintiff's witnesses said that he could not form an opinion as to whether a man is a careful and prudent driver by seeing him drive once. But, if it be conceded that he was ³⁵² incompetent, there was no attempt to show that Mr. McIlvain was and, as we have already said, there is no evidence of negligence after they left Halstead's, where he commenced driving. We can therefore have no hesitation in reaching the conclusion that the court was right in granting the defendants' first prayer.

2. The plaintiffs did not offer any evidence as to the proneness of the horses to run, excepting what occurred at Halstead's, and the testimony of Mr. Kuhlman, who spoke of an alleged admission by Mr. McIlvain, which we will refer to later on. When Mr. Kemp was on the stand, however, he said that: "On one occasion, not after they were broken horses, but when they were a pair of colts, not three years old (I had not had them in harness more than three times, I don't think), I started out from the place with them, my sister being with me, and we were crossing over a bridge and that shook the pole and the

yoke-strap broke and the pole dropped down and made the report of a pistol or a gun going off; naturally, the colts took fright and ran"; "that was between five and six years before the accident in question; after that I never had the slightest bit of trouble with them; they never showed any sign of fright or tried to run away up to the time of that accident." It is contended that their running then was some evidence of their proneness to run off, but even if it be conceded that the mere fact that a horse has run away once may be some evidence of its disposition to run, if there be no explanation of the circumstances, the one occasion shown by the record is so fully explained that it is impossible to find, or even to infer, from that that there was any tendency in them to run. A colt that would not run under the circumstances described would be an exception. The testimony offered on the part of the defendant, which is uncontradicted, shows beyond all question that from that occasion until the day of the accident complained of they were gentle and easily managed. A sister of Mr. Kemp had driven them since she was fifteen years of age, and although when in the city she usually had ³⁵³ a companion, which, to use her language, "was simply a matter of taste with me that I did not drive alone in the city," she did drive them alone or with a lady companion in the country. One witness, apparently experienced in the use of horses, spoke of them as "perfectly gentle but spirited horses"; another who had driven them said "there was not the slightest indication of their trying to run away"; another, who had ridden behind them a number of times, said: "They never showed any disposition whatever to run away or any signs of viciousness of any kind," and still another testified "they were perfectly quiet and gentle." The record, therefore, not only fails to show any proneness in the horses to run, excepting on the one occasion spoken of when they were under three years of age, but there is abundant affirmative proof of a contrary disposition. If horses must be kept off the public highways because they ran away when colts, under such circumstances as those described, our streets and public roads would soon have to be given up to horseless vehicles, for no one would be safe in the use of horses if he must be held responsible for an accident simply because they ran away when colts under such conditions as those spoken of. We do not understand that any of the authorities go to such a dangerous length, and we will briefly consider some of those cited by the counsel for the respective parties to this case.

In *Arnold v. Norton*, 25 Conn. 92, *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717, *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306, *Buckley v. Leonard*, 4 Denio, 500, and *Mann v. Weiand*, 81½ Pa. St. 243, cited by the appellants, the liability of the owners of dogs was under consideration, and, although in some of them it was held that there is no rule which requires any particular number of instances of unprovoked biting to prove a mischievous disposition in a dog to bite mankind, and that one instance might be sufficient under some circumstances, they do not go to the extent of holding that one such attack by a dog would be sufficient evidence of such disposition, if the facts disclosed that the dog was provoked or that the ³⁵⁴ biting was under circumstances that would not indicate a mischievous propensity. We will not stop to emphasize the fact that in all those cases dogs, and not horses, were being considered, or to comment on the distinction made in the authorities between dogs and horses. In *Cockerham v. Nixon*, 33 N. C. 269, which was a case of a bull injuring the plaintiff's horse, it was held that when the owner of an animal knows or has good reason to believe that he is likely to do mischief he must take care of him, and that it makes no difference whether the ground of suspicion arises from one act or from repeated acts, but it was also said that the act done must, however, be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of. In *Simson v. London etc. Omnibus Co.*, L. R. 8 Com. P. 390, the plaintiff was a passenger in the omnibus of the defendant, and the court held that there was sufficient evidence of negligence to justify the lower court in submitting the case to the jury. There the plaintiff was injured by the kick of one of the horses, but it was proven that the omnibus bore evidences of other kicks, and that no precaution had been taken by the use of a strap, or otherwise, against the possible consequences of a horse kicking, and no explanation was offered by the defendant. In *Benoit v. Troy etc. R. R. Co.*, 154 N. Y. 223, the general principles governing the liability of the owner of domestic animals, for personal injuries caused by them, are discussed, and after referring to injuries caused by kicking, biting, or other vicious propensities of such animals, which are known to the owner, and how such knowledge may be brought home or imputed to him, the court said: "In the absence of such knowledge or notice, an injury caused by such animal gives no right of action, but when the vicious habit or character of the animal becomes known to the owner, and he

thereafter continues to keep the animal he keeps it at his peril and renders himself liable for any subsequent injury to another caused by its viciousness." That court also held that there was error ³⁵⁵ in the court below in submitting to the jury the fact that the horse had run away on a previous occasion, as evidence of a propensity to run, and added that "we think the rule laid down by the court on the trial extends beyond reasonable limits the liability of owners of horses and imposes a burden not sanctioned by any case that has come to our notice." In *O'Brien v. Miller*, 60 Conn. 214, 25 Am. St. Rep. 320, it was held that the mere fact that a team was running away did not, as a matter of law, raise a presumption of negligence on the part of the driver. In *Unger v. 42d Street Ry. Co.*, 51 N. Y. 499, the court said that the explanation of the defendant's witnesses as to how the runaway happened, which was uncontradicted, sufficiently explained the transaction to acquit the defendant of negligence: See, also, *Holmes v. Mathir*, L. R. 10 Ex. 261; *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145; *Cadwell v. Arnheim*, 152 N. Y. 184. Other cases might be cited, but the above are sufficient to show the views that have generally been taken by the courts, and we know of no authority that would justify the court in permitting a jury to infer negligence simply because the defendant's horses ran away and an accident happened, without some evidence of the circumstances under which it occurred. A horse of ordinary spirit that will not run away under any circumstances would be a rare animal, and to hold that simply because one did run off on one occasion a jury would be justified in finding that he was vicious, wild, or prone to run, would enable jurors to find verdicts on mere speculation and guesses, instead of evidence. We have already said enough to indicate that we do not think that the running off when these horses were colts, the cause of which was explained, can be fairly used as any evidence of a disposition or proneness to run off, and what occurred at Halstead's would likewise be no guide for the jury in passing on that question, as the testimony of the witnesses shows a cause for their action on that occasion.

3. The only other question we need consider is the effect of the evidence of Mr. Kuhlman—whether that requires the court to ³⁵⁶ submit the case to the jury. He testified that a few days after the accident he met McIlvain on the street and talked with him about the accident; that McIlvain said the horses were vicious animals, and that Kemp was afraid to drive them in from Halstead's, and wanted to leave them there and send for a hos-

tlar, but that he, McIlvain, insisted that they drive them in, and on cross-examination testified that McIlvain said "we had no business driving the horses and he [the witness] thought he said we will take the chances and drive these horses in." Both of the defendants denied that such statements were made, but in passing upon these prayers we must accept his statement in connection with his other evidence as correct. He testified that he could not say that Mr. McIlvain admitted or indicated that they had ever had any previous trouble with the horses, and it is perfectly apparent that what was said as to their being vicious was in connection with the accident, which resulted not only in injuring both of the plaintiffs, but Mr. Kemp, who was more seriously injured than they were. Considering the results, Mr. McIlvain might well have regretted that they had driven the horses into town and might even have thought that they proved to be vicious on that occasion, but if he was a competent driver and the horses had always been gentle and easily managed prior to that time, and he knew of no previous attempt by them to run away, there was no reason why he should have hesitated to drive them into the city from Halstead's. As we have seen, Mr. Kemp was suffering at the time from a pain in his side, and he had been sick for some time. His physical condition might, therefore, have made him timid about driving the horses after they showed some spirit at Halstead's, but, if Mr. McIlvain was a competent driver, there was no reason why the appellees should be held responsible simply because they drove the horses into the city instead of leaving them at Halstead's. Even if it be conceded that the horses were somewhat unruly, or even inclined to run as they went into Halstead's, under the circumstances we ³⁵⁷ have stated, we are not prepared to say that the appellees rendered themselves liable for an accident that happened as this did, because they did not send for a hostler and let him take them into the city. It could hardly be contended that it was the duty of the appellees to leave them at Halstead's on account of their behavior there. It would be carrying the responsibility of the owner of horses to an unwarranted extent to hold that if horses, which had previously been gentle and easily managed, showed signs of being unruly whilst being driven, he must discontinue that drive and not be permitted to take them home. So if we place the construction upon the language testified to by this witness that would be most favorable to the appellants, we do not think it can so far overcome the positive and uncontradicted evidence as to the disposition of the horses, the com-

petency of Mr. McIlvain to handle them, and the circumstances attending the accident, as to justify the court in submitting the case to the jury on these alleged admissions alone, the meaning of which is at least doubtful, and outside of them there was nothing which could properly cause the court to hesitate to grant the instructions given. We will therefore affirm the judgment.

Judgment affirmed, costs below and in this court to be paid by the appellants.

NEGLIGENCE AGAINST THE OWNER OR DRIVER OF A HORSE is not presumed from the fact that a horse, while attached to a cart and in charge of the driver, ran away and injured a person, notwithstanding the driver's efforts to control him: *O'Brien v. Miller*, 60 Conn. 214, 25 Am. St. Rep. 320.

ACCIDENT—PRESUMPTION OF NEGLIGENCE IN CASE OF. In general, the happening of an accident does not raise a presumption of negligence, yet in many instances, notably in respect to carriers of persons, a contrary rule is invoked: Note to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 792-795. For cases where this doctrine has been applied, see note to *Philadelphia etc. R. R. v. Anderson*. 20 Am. St. Rep. 490-495.

FOX v. STATE.

[89 MARYLAND, 381.]

POLICE POWER—OLEOMARGARINE.—A state may prohibit the manufacture of oleomargarine within its borders, and the sale of oleomargarine manufactured therein.

COURTS OF UNITED STATES—DECISIONS OF.—Upon a question arising under the constitution of the United States, the state courts are bound by the decisions of the United States supreme court.

INTERSTATE COMMERCE—OLEOMARGARINE.—A state legislature cannot prohibit the importation and sale within the state of a pure article of commerce, so long as it remains in the original package. Hence a state cannot prohibit the importation and sale in the state of oleomargarine made in imitation and semblance of butter.

INTERSTATE COMMERCE—POLICE POWER—SALE OF OLEOMARGARINE.—A state may pass all laws necessary to prevent deception and fraud in the sale, within its limits, of articles in whatever state manufactured or from whatever state imported or introduced. Hence a state may prohibit the sale of impure and deleterious oleomargarine, whether made in the state or elsewhere, and whether sold as butter or oleomargarine.

OLEOMARGARINE—EVIDENCE.—Where an indictment charges that the defendant kept and offered for sale impure and deleterious oleomargarine made in part out of acids and other deleterious substances, testimony is insufficient and is properly excluded

which is offered to prove merely that the oleomargarine in question was an article of commerce in semblance and imitation of natural butter, that it was manufactured in another state out of animal fats and vegetable oils, that it was not sold as butter, but as oleomargarine.

CRIMINAL LAW—PLEADING.—A plea which does not answer the whole indictment or all of the counts to which it is pleaded is defective.

Edgar H. Gans and T. C. Ruddell, for the appellant.

George R. Gaither, Jr., attorney general, and Henry Duffy, state's attorney for Baltimore City, for the appellee.

353 FOWLER, J. The traverser was indicted in the criminal court of Baltimore City for selling oleomargarine contrary to law. There are three counts in the indictment. The first charges the sale of "a certain article in imitation and semblance of natural butter produced from unadulterated milk and cream of the same, the said article then and there being rendered and manufactured out of animal fats and animal and vegetable oils not produced from unadulterated milk or cream from the same." The second count alleges that the traverser kept for sale and offered for sale the article or substance described in the first count. And the third is based upon the allegation of unlawfully keeping and offering for sale ten pounds of a certain compound in imitation of natural butter, produced by compounding with and adding to milk, cream, and butter "certain acids and other deleterious substances, animal fats, and animal oils not produced from milk or cream." To this indictment the traverser pleaded a special plea. It was pleaded to each of the three counts and therefore to the whole of the indictment. The state demurred, and its demurrer was sustained. The traverser pleaded the general issue, and, having been tried before a jury on all three counts of the indictment, a general verdict of guilty was found, and the traverser was adjudged to pay a fine of one hundred dollars and costs.

After introducing evidence in support of the allegations of the indictment, the state rested, and the traverser offered to prove the facts which he pleaded in his special plea. These facts, so far as it is necessary to rehearse them for the purposes of the present discussion, are as follows: That the oleomargarine, the subject of the sale charged in the indictment, was shipped from Chicago by William J. Moxley, a citizen of Illinois, to his agent, the traverser, in Baltimore, in a package separate and apart from all other packages, being a ten pound package, packed, sealed, marked, stamped, and branded according to the act of

Congress of August 2, 1886; that this package was an original package which was ³⁸⁴ sold by the traverser at his place of business in the city of Baltimore to the purchaser; that said package was not broken or opened on said premises of the traverser; that the said oleomargarine was an article in imitation and semblance of natural butter, the said article having been manufactured out of animal fats and animal and vegetable oils; but the fact that the article was not butter was made known by the traverser to the purchaser, and there was no attempt or purpose of the traverser to sell the article as butter and that said oleomargarine is recognized by said act of Congress of August 2, 1886, as an article of commerce. Upon the objection of the state, this evidence was ruled out and the traverser excepted, and has appealed. Upon this appeal both the ruling upon the demurrer and on the evidence are open for review: Act 1892, c. 506; *Avirett v. State*, 76 Md. 510; *State v. Floto*, 81 Md. 600.

The same question, however, is presented by both branches of the case, and that is, so far as the first and second counts of the indictment are concerned, whether the prohibition contained in section 89 of article 27 of the code against the sale of any article made "in imitation or semblance of natural butter" is a valid exercise of legislative power, when applied to the sale here of oleomargarine in the original package manufactured in another state. We will presently consider the third count of the indictment.

1. First, then, the question as it is presented by the ruling upon the testimony. It is conceded by the state, and it is apparent from the counts of the indictment we are now considering, that they are based upon the first part of section 89 of article 27, known as the oleomargarine law of this state. This and other sections of our code prohibiting the sale and manufacture of oleomargarine have been several times before this court for construction, and their validity has been again and again upheld, so far as they prohibit the manufacture of oleomargarine within this state, and the sale within this state of oleomargarine manufactured herein: *Wright v. State*, 88 Md. 436, decided at November term, 1898; ³⁸⁵ *McAllister v. State*, 72 Md. 390; *Pierce v. State*, 63 Md. 592. But now for the first time we are required to decide whether these provisions of our statute prohibiting the sale of an article made in imitation and semblance of natural butter are valid as applied to such an article made in another state and offered for sale here in the orig-

inal package. On the part of the state it is contended that these provisions of our statute are valid as prohibitions of the sale of oleomargarine made in imitation and semblance of natural butter, whether such article be made in or outside of this state, and the case of *Plumley v. Massachusetts*, 155 U. S. 462, and *Powell v. Pennsylvania*, 127 U. S. 685, are relied upon to sustain this position. On the other hand, the traverser contends that the decision of the case now before us is controlled by the more recent case of *Schollenberger v. Pennsylvania*, 171 U. S. 1; and that our statute is void under the commerce clause of the constitution of the United States, so far as it attempts to prevent the introduction and prohibit the sale within this state of oleomargarine in the original package. It will, therefore, be necessary to examine the cases relied on by the state and the traverser respectively to ascertain how far they are applicable to the questions here presented. For, whatever our own views may be, we must, when, as we are here, confronted with a federal question be governed by the decisions of that tribunal, which, by the constitution of the United States, is made the court of last resort in the determination of questions arising under its provisions. It is sufficient to say in regard to *Plumley v. Massachusetts*, 155 U. S. 462, as well as *Powell v. Pennsylvania*, 127 U. S. 685, that in neither of them did the question here presented arise. "The *Powell* case," says Justice Peckham, in delivering the opinion of the court in *Schollenberger v. Pennsylvania*, 171 U. S. 1, "did not and could not involve the rights of an importer under the commerce clause. The right of a state to enact laws in relation to the administration of its internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect ³⁸⁶ wholly within the state, and upon products manufactured and sold therein, might be held valid as not in violation of any provision of the federal constitution, when, at the same time, legislation directed toward prohibiting the importation within the state of the same article manufactured outside its limits might be regarded as illegal, because in violation of the rights of citizens of other states arising under the commerce clause of that instrument." And after an elaborate examination of *Plumley v. Massachusetts*, 155 U. S. 462, the same learned judge continues: "It will thus be seen that the case [of *Plumley*] was based entirely upon the theory of the right of a state to prevent deception and fraud in the sale of

any article, and that it was fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that this right of the state was upheld." "The question," he continues, "of the right to totally prohibit the introduction from another state of the pure article did not arise, and of course was not passed upon." Much has been, and doubtless more will be, said in reference to the alleged conflict between *Schollenberger v. Pennsylvania*, 171 U. S. 1, and the other cases to which we have just referred. But whether such conflict be real or only apparent it is clear that in the *Schollenberger* case the supreme court has reiterated in emphatic terms what has been so often declared by that court, that no state legislature can validly prohibit the importation and sale within the state of a pure article of commerce, so long as it remains in the original package.

2. The question then arises whether the article which is charged in the first and second counts of the indictment to have been unlawfully sold and kept for sale by the traverser is an article of commerce, as defined by the supreme court of the United States. Since the decision of *Schollenberger v. Pennsylvania*, 171 U. S. 1, there can be no doubt as to the result of this inquiry, if we are to be bound by the views expressed in that case. The act of Congress of August 2, 1886 (24 Stats., p. 209, sec. 2), defines oleomargarine as an article "made in imitation ³⁸⁷ and semblance of butter." These are the very words used in our statute to describe and define the article the sale of which is thereby (absolutely) prohibited. After a full discussion of the effect of the act of Congress, and having given the history of the origin and of the manufacture of oleomargarine, the article "made in imitation and semblance of butter," the court declares: "Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the states and with foreign nations." This being so, it is not within the power of the state to prohibit the importation and sale here of oleomargarine made in imitation and semblance of butter, because such legislation would be a clear violation of the commerce clause of the constitution of the United States so far as it regulates interstate commerce.

But it must not be forgotten that the state may pass all laws necessary to prevent deception and fraud in the sale, within its limits, of articles in whatever state manufactured or from whatever state imported or introduced. This right is recognized by all the authorities and by no decision more fully than by the

supreme court of the United States in *Schollenberg v. Pennsylvania*, 171 U. S. 1, to which we have so frequently referred. From what we have said it follows that when the traverser offered to show by the evidence which was excluded that the oleomargarine was made in the state of Illinois, that it was shipped thence to him in the city of Baltimore, and was sold by him and offered for sale only in the original package in which it was imported from the place of its manufacture, he should have been allowed to do so, because our statute must not be so construed as to be in direct conflict with the constitution of the United States, if a construction in harmony with it be possible. If, therefore, as we are bound to do, such a construction being not only possible but reasonable, we construe the prohibitory provisions of our statute, to which we have referred, so as to limit them to oleomargarine made in this state, and sold or offered for sale here, they will be ³⁸⁸ free from objection. And the statute itself being in this respect valid, the first and second counts of the indictment based on it must be held good. In the case of *Dickhaut v. State*, 85 Md. 464, 60 Am. St. Rep. 332, we held the statute there under consideration must be construed to relate to game killed in this state, although the terms were general, and could have applied as well to game killed outside the state. And this construction was adopted because we considered it a reasonable one. In the same case the indictment was held good upon demurrer, although the traverser was charged with having in his possession game, there being no allegation whether it was killed within or outside of the state. But we held, according to the well-settled rule, that it was sufficient if the statutory offense should be described in the indictment in the words of the statute itself. In the case now before us, as in that, after the state had offered evidence tending to sustain the allegations of the indictment, it was the right of the traverser to show, if he could, that the article he was charged with unlawfully selling was not embraced within the terms of the statute. But, as we have seen, this he was not allowed to do.

3. The third count, however, is based upon another part of the same section. This count charges that the traverser kept and offered for sale oleomargarine, produced by mixing with milk certain acids and other deleterious substances and animal fats and animal and vegetable oils. It is clear from all the authorities that this portion of section 89, article 27, of the code, on which this count is framed, is valid, not only as respects oleomargarine made contrary to its provisions in this state, but

it extends to and includes all oleomargarine so made anywhere. For the execution of its police power the states have the right to pass such laws as may be necessary and proper to prevent fraud and deception in the sale of any commodity, although it be an article of commerce, and whether made within or without, and imported within, the state for sale in original packages or otherwise. The testimony, therefore, ³⁸⁹ consisting of the same facts set out in the special plea, and hereinbefore rehearsed, does not answer the allegation of the third count of the indictment. That allegation is that the traverser kept and offered for sale impure and deleterious oleomargarine made in part out of acids and other deleterious substances. He offered to prove that the oleomargarine in question was an article of commerce in semblance and imitation of natural butter, that it was manufactured in another state out of animal fats and vegetable oils, that it was not sold as butter, but as oleomargarine. But the proof, as offered, should have gone farther. The state had offered testimony tending to prove the allegations of the indictment, and the burden was upon the traverser to show, if he could, not only that the oleomargarine was an article of commerce, but that it was pure, unadulterated, and free from "acids and other deleterious substances." The evidence offered, without being accompanied by that which was omitted, was entirely immaterial and irrelevant, because, as we have said, no one denies the right of the state to prohibit absolutely the sale or keeping for sale an impure or harmful article of food, whether made here or elsewhere, whether sold as butter or oleomargarine, or whether called an article of commerce or not. It follows, therefore, that the testimony offered was properly excluded.

4. We need say but little in regard to the question as presented by the demurrer. For the reasons already given, the facts set forth in the special plea would have afforded a good defense to the first and second counts if they had been properly pleaded. But the special plea was pleaded to each count, and therefore to the whole of each count, and to the whole of the indictment. But, clearly as we have already pointed out in discussing the question as presented by the exception to testimony, the facts set forth in the plea do not answer, as the plea professes to do, the whole indictment, nor even the whole of the third count. For this reason the plea is defective: Poe on Pleading, sec. 664, note 3. But, in addition to this objection, the plea amounts to ³⁹⁰ the general issue, and is bad for this reason also: Poe on Pleading, sec. 637 et seq.

From what we have said it follows that the demurrer to the special plea was properly sustained. But there was error in refusing to allow the traverser, in answer to the first and second counts of the indictment, to prove the facts which he offered to prove. The state should have asked the court to exclude the testimony under the third count, for, as we have seen, it was not admissible under the issue presented by that count. But if admissible for any purpose, as it was, it was error to exclude it altogether.

Judgment reversed and new trial awarded.

IN THE SUBSEQUENT CASE of *Rasch v. State*, 89 Md. 755 (unreported cases), also involving the validity of the act prohibiting the sale of oleomargarine, it was held that a special plea to an indictment interposed by the defendant is fatally defective where it fails to aver that the article was sold in the original package in which it was imported, and an offer of testimony is insufficient and properly rejected where it fails to offer to prove the same fact. And in *Hancock v. State*, 89 Md. 725, it was held no defense to an indictment of a restaurant keeper for serving oleomargarine that the article served was a wholesome article of food imported from another state, since such use of the article cannot be considered as a sale in the original package, and a sale in the original package is necessary in order to bring the act within the protection of the federal constitution.

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES upon all questions involving the construction of the constitution of the federal government, the acts of Congress, and foreign treaties, are binding upon and will be followed by the state courts: *McFarland v. State Bank*, 4 Ark. 44, 37 Am. Dec. 761.

POLICE POWER.—A STATE MAY PROHIBIT the manufacture and sale of oleomargarine therein: *Note to State v. Goodwill*, 25 Am. St. Rep. 888.

INTERSTATE COMMERCE.—A SALE OF OLEOMARGARINE, otherwise in violation of law, is not protected as a part of interstate commerce by proof that it was made in another state and was sold in the form in which it was originally put up: *Commonwealth v. Schollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32. But see *State v. Goetze*, 45 W. Va. 495, 64 Am. St. Rep. 871.

INTERSTATE COMMERCE.—A STATE MAY PROHIBIT THE SALE OF OLEOMARGARINE therein, unless it is colored pink, whether made within the state or imported in the original package: *State v. Myers*, 42 W. Va. 822, 57 Am. St. Rep. 887.

STATE v. BROADBELT.

[89 MARYLAND, 565.]

CONSTITUTIONAL LAW.—THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT of the constitution of the United States does not require that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection is deemed equal if all persons in the same class are treated alike under like circumstances and conditions. The classification must, however, be based upon reasonable grounds.

POLICE POWER—REGULATION OF DAIRYMEN.—An act prescribing certain sanitary regulations to be observed by dairy-men and other individuals who supply milk to cities, towns, and villages, makes a reasonable classification of persons by whom the sale of impure milk would be especially injurious to the public, and the act, being applicable to all persons of that class, is valid, although other persons selling milk to individuals in the country are not included within its regulations. Such regulations are a valid exercise of the police power of the state, designed to protect the public health.

THE POLICE POWER CAN BE RESORTED TO FOR THE PURPOSE of preserving the public health, safety, or morals, but it cannot be put forward as an excuse for oppressive and unjust legislation.

POLICE POWER—REGULATION OF PROPERTY.—Every owner of property holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.

THE POLICE POWER, legitimately exercised, can neither be limited by contract nor bartered away by legislation.

George R. Gaither, Jr., attorney general, and Richard M. Venable, for the appellant.

William Pinkney Whyte, for the appellee.

574 McSHERRY, C. J. The appellee was indicted under the act of 1898, chapter 306, passed by the general assembly of Maryland, and entitled, "An act to add certain new sections to article 58 of the Code of Public General Laws, title 'Livestock,' under the new subtitle, 'Dairies,' to follow section 18," etc. He demurred to the indictment upon the ground that the statute was unconstitutional. His demurrer was sustained by the criminal court of Baltimore City, the indictment was quashed, and the state has appealed. The reasons upon which he bases his claim that the statute is void are, that it denies the equal protection of the laws guaranteed by section 1 of the fourteenth amendment to the federal constitution, and deprives the individual of the due process of law secured by that amend-

ment and by article 23 of the Maryland declaration of rights. Both of these, or similar, grounds of attack have of late years been very frequently resorted to in assailing the validity of state legislation enacted in the exercise of the police power, and numerous judgments have been delivered by the supreme court of the United States in cases where this method of assault has been relied on. A review of, or even a reference to, all ⁵⁷⁵ these cases would not be practicable within the limits of this opinion, but brief citations, later on, from some of them, will serve to illustrate the principles which underlie them all. Those principles must control the final disposition of this prosecution.

By the act of 1888, chapter 519, a "state livestock sanitary board" was created. It consists of three members appointed by the governor, by and with the advice and consent of the senate. It is charged with various duties, looking to the prevention and the spread of contagious and infectious diseases amongst the livestock within the state. Its powers are exercised for the preservation of the public health. The provision of the statute under which the indictment now before us was framed reads as follows: "Sec. 19. It shall be the duty of all dairymen or herdsmen or private individuals supplying milk to cities, towns, or villages, to register their herds of cattle with the livestock sanitary board; in violation of which the parties offending shall be fined not less than one dollar nor more than twenty for each offense." Section 20, and the rules which it formulates, are in these words: "20. It shall be the duty of the livestock sanitary board to have inspected, at least annually, without notice to the owner or those in charge of any dairy, or the parties supplying milk as named in section 19 of this article, the premises wherein cows are kept, and if such premises are found in an unsanitary condition, the said board may prohibit the sale and shipment of milk from such premises until such time as such premises shall conform to the following sanitary rules:

"Rule 1. No building or shed shall be used for stabling cows for dairy purposes which is not well lighted and ventilated, and which is not provided with sufficient feed troughs or boxes, and suitable floor, laid with proper grades and channels to immediately carry off all drainage; and, if a public sewer abuts the premises upon which such building is situated, they shall be connected therewith, ⁵⁷⁶ whenever the inspector considers such sewer connection necessary.

"Rule 2. No water-closet, privy, cesspool, or urinal shall be located within any building or shed used for stabling cows for dairy purposes or for the storage of milk or cream; nor shall any fowl, hog, sheep, or goat be kept in any room used for such purposes.

"3. It shall be the duty of each person using any premises for keeping cows for dairy purposes to keep such premises thoroughly clean and in good repairs, and well painted or whitewashed at all times.

"4. It shall be the duty of each person using any premises for keeping cows for dairy purposes to cause the building in which cows are kept to be thoroughly cleaned, and to remove all dung from the premises, so as to prevent its accumulation in great quantities.

"5. Any person using any premises for keeping cows for dairy purposes shall provide and use a sufficient number of receptacles, made of nonabsorbent materials, for the reception, storage, and delivery of milk, and shall cause them at all times to be cleaned and purified, and shall cause all milk to be removed without delay from the rooms in which cows are kept.

"6. Every person keeping cows for the production of milk for sale shall cause every such cow to be cleaned every day and to be properly fed and watered with abundance of pure, clean water.

"7. Any inclosure where cows are kept shall be graded and drained, so as to keep the surface reasonably dry; no garbage, fecal matter, or similar matter shall be placed or allowed to remain in such inclosure unless sufficient straw or similar good absorbent material be used to keep the inclosure clean at all times, and no open drains shall be allowed to run through it. And any person who shall ship or sell milk contrary to the aforesaid order of said board shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one dollar nor more ⁵⁷⁷ than twenty dollars for each day during which shipments shall be made after notice of such order."

The indictment charges that the appellee, being a dairyman engaged in supplying milk to cities, towns, and villages within this state, failed, neglected, and refused to register his herd of cattle with the livestock sanitary board. The demurrer admits these averments to be true.

So far as the nineteenth section of the act is concerned, it is not perceived that, standing alone, it deprives the appellee of due process of law in any way whatever. This is not a proceeding under the twentieth section. The requirement of the

nineteenth section would be of little value if it were not followed by, and did not form a part of, the other provisions of the statute. The entire act is strictly a police regulation, enacted for the purpose of preserving the public health. The strides which our knowledge of bacteriology has made in recent years are generally known; and the ubiquitous microbe has been shown to be a potent agent in the propagation of disease. Tuberculosis, identical it is said with consumption in man, is caused by the organism known as Koch's bacillus, and is readily communicable through milk. Diphtheria is another contagious disease whose specific organism finds in milk favorable conditions of growth; and there is abundant evidence to show that contaminated milk transmits this contagion. Cholera has again and again been traced to the same source; and scarlet fever is generally believed to be communicable by infected milk, and it is said that it may be even caused by an eruption on the udder. Typhoid fever bacilli have been detected in milk supposed to be wholesome. Besides conveying disease, milk occasionally contains certain germs which form poisonous products known as ptomaines. Milk may carry the bacilli of these and perhaps other deadly diseases to infancy, to adolescence, and to age; to the delicate and to the robust alike, and to persons in every class and condition of society. It may receive these germs direct from the cow, if the cow be unhealthy; or it may ⁵⁷⁸ absorb them from the dairy, the dairy utensils, or the stable, if these be uncleanly. Thorough inspections of cattle and dairies may reduce the frequency of infection. The preservation of the public health by preventing the sale of infected milk, or of milk that may come from infected sources, when milk, by reason of its almost universal use in one form or another as an article of food, is especially likely to spread disease, is one of the most imperative duties of the state, and obviously one most incontestably within the scope of the police power. As a means to that end—the preservation of the public health—a requirement that every person selling milk for consumption in cities, towns, and villages shall cause his herd of cattle to be registered with the livestock sanitary board, is a reasonable and an appropriate enactment; and the subsequent provisions are necessary parts of the scheme. The nineteenth section no more deprives the individual of due process of law than did the ordinance in *Easton v. Covey*, 74 Md. 262, which prohibited the erection of any building without a permit from the commissioners of the town; or an ordinance forbidding the

keeping of swine without a permit in writing from the board of health: *Quincy v. Kennard*, 151 Mass. 563; or an ordinance requiring the written permission of the mayor of a town before any person was allowed to move a building along the streets: *Wilson v. Eureka City*, 173 U. S. 32 (decided February 20, 1899); or the ordinance requiring a license for the removal of the contents of privies, and subjecting the holders of such license to the orders of the board of health: *Boehm v. Mayor etc.*, 61 Md. 259. The constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law have never been construed as being "incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . . The exercise of the police power by the destruction of property 579 which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law": *Mugler v. Kansas*, 123 U. S. 623.

It was earnestly insisted that the act of 1898 deprives the appellee of the equal protection of the law guaranteed by the fourteenth amendment. This amendment was called to the attention of the supreme court for the first time in 1872, in the *Slaughter-House Cases*, 16 Wall. 36; and since then it has been repeatedly considered and interpreted. The scope of the amendment, in so far as it relates to the branch of the subject now under discussion, has been briefly but clearly stated by the late Judge Cooley: "The guaranty of equal protection is not to be understood, however, as requiring that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds; it cannot be a mere arbitrary selection": *Cooley's Constitutional Law*, 249. This is abundantly supported by the adjudged cases: *Hays v. Missouri*, 120 U. S. 68; *Missouri etc. Ry. Co. v. Mackey*, 127 U. S. 205; *Walston v. Nevin*, 128 U. S. 578; *Bell's Gap Ry. Co. v. Pennsylvania*, 134 U. S. 232; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148

U. S. 657; *Columbus etc. Ry. Co. v. Wright*, 151 U. S. 470; *Marchant v. Pennsylvania R. R. Co.*, 153 U. S. 380; *St. Louis etc. Ry. Co. v. Mathews*, 165 U. S. 1. Thus in *Hays v. Missouri*, 120 U. S. 68, it was held that a statute of a state which provided that in capital cases, in cities having a population of over one hundred thousand inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, whilst elsewhere in the same state the prosecution was only allowed eight such challenges, ⁵⁸⁰ did not deny to a person tried for murder in a city containing over one hundred thousand inhabitants, the equal protection of the laws enjoined by the fourteenth amendment, and that there was no error in refusing to restrict the state's peremptory challenges to eight. And so in the very recent case of *Central Loan etc. Co. v. Campbell Commission Co.*, 173 U. S. 84 (decided by the supreme court on February 20, 1899), it was held that a statute permitting an attachment against a nonresident debtor without a bond, whilst requiring a bond for an attachment against a resident debtor, does not constitute a denial to the nonresident of the equal protection of the laws, because it was within the power of the legislature to divide debtors into two classes—nonresident and resident—and, when so classified, to prescribe different methods of proceeding against them. The classification which the legislature is authorized to make may relate to territorial divisions of a state. Thus, in *Missouri v. Lewis*, 101 U. S. 22, it was said by Mr. Justice Bradley: "We might go still further and say, with undoubted truth, that there is nothing in the constitution to prevent any state from adopting any system of laws or judiciary it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws." The classification may have reference to occupations: *Holden v. Hardy*, 169 U. S. 366, where it was held that a state statute limiting the period of employment of workmen in underground mines, or in the smelting, reduction, or refining of ores or metals, to eight hours per day, and making its violation a misdemeanor, was a valid exercise of the police power of the state. Or, again, the ⁵⁸¹ classification may re-

late to individuals: *St. Louis Ry. Co. v. Mathews*, 165 U. S. 1. But in every instance the classification, to be valid, must be based on reasonable grounds. It must not depend on distinctions which do not furnish any proper basis for the attempted classification. "That," as declared by the supreme court in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." In the case just cited, a statute of Texas imposing an attorney's fee in addition to costs upon railway companies omitting to pay certain claims within a certain time, which applied to no other corporations or individuals, was declared unconstitutional as denying to railway companies the equal protection of the laws. In the course of the court's opinion, Mr. Justice Brewer said: "It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other." "It is," said the same court in a very recent case, "the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public." "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." "While cases on either side and far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation": *Atchison etc.* ⁵⁸² *R. R. Co. v. Mathews*, 174 U. S. 96 (decided April 17, 1899). Special burdens are often necessary for general benefits, particularly in respect to the preservation of the public health. "Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little inconvenience as possible, the general good. Though in many respects necessarily special in their character,

they do not furnish just ground of complaint, if they operate alike upon all persons and property under the same circumstances and conditions": *Barbier v. Connolly*, 113 U. S. 31.

If the legislature of Maryland has, by the statute under consideration, made a class to which the provisions of the act were designed to apply, and if that classification is just and reasonable and not purely arbitrary, the ruling on the demurrer was wrong. The ultimate object of the statute was, as we have seen, to protect the health of persons living in cities, towns, and villages, from the disease to which impure or contaminated milk might expose them. There is a definite and well-ascertained class of persons described in the statute, and that class comprises dairymen, herdsmen, and other individuals who supply milk to cities, towns, and villages. It was not the purpose of the act to include within its purview all persons who sell milk; but it put into a class all dairymen, herdsmen, and individuals who supply milk to cities, towns, and villages—those who are engaged in the business of selling milk in populous communities. These persons are singled out from all others who may own cows, or who may occasionally sell milk in the country to some individual, and are grouped into a class, because they are the persons whose carelessness, whose inattention to their herds, or whose uncleanly surroundings may originate or promote the spread of disease in populous localities. No dairyman, herdsman, or individual who supplies milk to cities, towns, or villages is exempted from the operation of the law, but all who are thus engaged are specifically included. ⁵⁸³ There is no uncertainty as to the persons composing the class, and no dispute that the general assembly intended to make exactly that classification.

Is the classification just and reasonable, and free from the imputation of being merely arbitrary? The act, in respect to which the classification is proposed, is the act of supplying milk to cities, towns, and villages by dairymen, herdsmen, and other individuals. It is founded on the right of the state, in the exercise of its police power to classify occupations with relation to their peculiar liability to cause injury to the inhabitants of the designated places from the article of food employed in the business. It is identical in principle with the classification under a Utah statute, by which a conclusive presumption of negligence was made to apply to persons driving a herd of cattle over a public highway, whilst the same presumption did not apply to a person driving less than a herd:

Jones v. Brim, 165 U. S. 180. There is an obvious difference between the occasional sale of milk to an isolated individual and the habitual sale of it to the inhabitants of a city, a town, or a village; and this difference is manifestly sufficient to "furnish a reasonable basis for separate laws and regulations": *State v. Loomis*, 115 Mo. 307. The clear purpose of the legislature was to guard against impurities in milk furnished to residents in populous settlements, by requiring persons who supply milk to cities, towns, and villages to keep their cows and premises in a sanitary condition. The danger arising from the nonobservance of the sanitary rules prescribed by the act is increased in proportion to the increased number of the consumers of milk; and a contagious disease introduced by contaminated milk in a thickly-settled locality is vastly more serious, because vastly farther reaching, than it can possibly be when communicated, by the same means, to an isolated individual. The duty to avoid the introduction of disease, in both cases, is unquestionably incumbent on the vendor of milk, but there is every reason why a breach of ⁵⁸⁴ that duty will be far more injurious in the one than in the other instance.

Though the statute furnishes no protection to persons not living in cities, towns, or villages, this in no way indicates that its classification is unreasonable, or that it deprives anyone of the equal protection of the laws in the sense that would annul it: *Hays v. Missouri*, 120 U. S. 68. It was designed like many other health laws, to operate in a restricted territory. There are numerous health laws which do not operate on persons living beyond the limits within which they are applicable; but it by no means follows that they are void merely because they were not made to cover a wider range of country; because a classification may be made with reference to the subdivisions of a state: *Missouri v. Louis*, 101 U. S. 22. It would not have been practicable to have made the statute broad enough to include every vendor of milk, whether he sold to cities, towns, and villages, or only to a single individual; nor was it necessary, in order to reach the evil aimed at, that this should have been done. Laws relating to the inspection of milk do not operate outside of the large cities, and yet it has never been held that they are invalid on that account. The act creates a reasonable class and bears upon all in that class alike; and it cannot be assailed because it may not, perhaps, be efficacious enough to wholly eradicate the evil it was framed to extirpate. Such a test of its constitutionality would make the validity of

a measure depend upon the universality of its application and not upon the fact that the classification was just and reasonable, and was made with reference to some difference which bore a proper relation to the act in respect to which the classification was proposed.

The twentieth section of the act does in a measure interfere with property rights, but not to such an extent or in such a way as to impair the validity of the enactment. Whilst it is undoubtedly true that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may, most certainly, be resorted to for the purpose ⁵⁸⁵ of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion "is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests": *Lawton v. Steele*, 152 U. S. 133. As observed by Chief Justice Shaw, in *Commonwealth v. Alger*, 7 Cush. 84: "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." "This power, legitimately exercised, can neither be limited by contract nor bartered away by legislation": *Holden v. Hardy*, 169 U. S. 366.

The requirements of the twentieth section of the act of 1898 are simply such regulations as the general assembly had, in the exercise of the police power, the undoubted authority to prescribe. A dairyman has no right to sell milk that may be contaminated, or that may be given by diseased cows, or may be kept on uncleanly premises, or in unsterilized utensils; and, if he undertakes to sell milk at all to cities, towns, and villages he must submit to such reasonable sanitary regulations respecting his property used in that business, as the legislature may deem necessary to prevent that property from being the source or origin of infectious and contagious diseases. No matter how absolute his title, he holds his property subject to

this liability, that his use of it may be so regulated as that it shall not be injurious to the community. The statute does not deprive ⁵⁸⁶ him of his property; but it does impose upon him the duty of so using it, when employed in that business, that no injury shall result to others, most likely to be affected by a disregard on his part of the reasonable health regulations which it enacts. Almost every police regulation affects, to a greater or less extent, some property right; but there is no such invasion of a property right by this act as other valid statutes have permitted. For example: In the Slaughter-House Cases, 16 Wall. 86, a law of the state of Louisiana, vesting in a slaughter-house company the sole and exclusive privilege of conducting a livestock landing and slaughter-house business, and requiring that all animals should be landed at the stock-landings and slaughtered at the slaughter-houses owned by the company and nowhere else, was upheld as a valid exercise of police power, though it rendered practically valueless other property that had previously been used by its owners for slaughter-houses: See, too, *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Parker and Worthington on Public Health and Safety*, sec. 251.

For the reasons we have given, we are perfectly satisfied the act of 1898 is a valid exercise of the police power, and that it is entirely free from constitutional objections. There was consequently error in the ruling which sustained the demurrer. The judgment appealed from will, accordingly, be reversed, and the case will be remanded for a new trial.

Judgment reversed and new trial awarded; costs above and below to be paid by the appellee.

CONSTITUTIONAL LAW.—THE FOURTEENTH AMENDMENT. IN ITS GUARANTY OF THE EQUAL PROTECTION OF THE LAW, does not prohibit statutes, public in their objects and confined to a particular class, if general in their application to the cases directed to and not arbitrary in their distinction, but resting upon some reason of public policy; but it does forbid a statute which selects particular individuals from a class or locality and imposes upon them special rules and obligations, from which others in the same locality or class are exempt: Note to *Harding v. People*, 52 Am. St. Rep. 349. In this connection, see note to *State v. Goodwill*, 25 Am. St. Rep. 879-885.

POLICE POWER.—A STATUTE PROVIDING THAT RESIDENT OWNERS OF STOCK found running at large in a town shall pay a greater penalty therefor than nonresident owners is a mere police regulation, and is not unconstitutional as denying to anyone the equal protection of the law: *Broadford v. Fayetteville*, 121 N. C. 418, 61 Am. St. Rep. 668.

THE POLICE POWER CANNOT BE BARTERED OR CONTRACTED AWAY by a state: *Commonwealth v. Douglas*, 100 Ky.

116, 66 Am. St. Rep. 328; nor abridged by contract stipulations between individuals: *Fidelity etc. Co. v. Friedenberg*, 175 Pa. St. 500, 52 Am. St. Rep. 851.

POLICE POWER.—THE OWNER OF PROPERTY HOLDS IT SUBJECT TO the implied obligation that he will so use it as not to interfere with the rights of others, and subject to such reasonable regulations as the legislature may impose upon its use, in order to protect the rights of the public and of others in the use of their property: *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305.

IN THE EXERCISE OF THE POLICE POWER, LEGISLATURES cannot arbitrarily invade private rights or property: *Chicago etc. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557; nor enact laws not necessary to the preservation of the health and safety of the community, but which will be oppressive and burdensome on the citizens: *Note to Butler v. Chambers*, 1 Am. St. Rep. 645.

HELLER v. NATIONAL MARINE BANK.

[89 MARYLAND, 602.]

CORPORATIONS—PREFERRED STOCKHOLDERS.—As between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution of its assets, entitled to nothing until its creditors are first fully paid.

CORPORATIONS—CAPITAL STOCK—WITHDRAWAL.—No part of the capital stock of a corporation can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are satisfied.

CORPORATIONS—PREFERRED STOCK—RIGHTS IN. Calling stock preferred stock does not per se define the rights in such stock, but these depend on the statute or contract under which it was issued.

CORPORATIONS—PREFERRED STOCK—STATUTORY LIEN.—Ordinary preferred stock has no lien on the property of a corporation. But where a statute plainly gives a lien and preference, then such stock is not ordinary preferred stock, though it is so called and though it possesses many incidents in common with preferred stock.

CORPORATIONS—PREFERRED STOCK—STATUTE—PUBLIC POLICY.—A statute which authorizes corporations, instead of issuing bonds secured by mortgage for money borrowed, to issue preferred stock which "shall be and constitute a lien on the franchises and property of such corporation, and shall have priority over any subsequently created mortgage or other encumbrance," creates a valid lien on franchises and property of the corporation, and is not against public policy, since public policy in such a case is what the statute enacts.

CORPORATIONS—PREFERRED STOCK—PRIORITY.—A STATUTE giving to preferred stock a "priority over any subsequently created mortgage or other encumbrance" gives a priority to such stock over all unsecured claims which subsequent mortgages, if created, would have preference over.

INSURANCE MONEY—RIGHT OF LIENHOLDER TO.—A policy of insurance against loss by fire is a personal contract of

indemnity, which does not attach to the realty or in any manner go therewith, unless there is some special stipulation to that effect between the insurer and the insured. Consequently, a mortgagee, or any other lien creditor, has no right to claim the benefit of a policy underwritten for the mortgagor or owner of the property, unless there is an express agreement permitting it.

LIENS—EFFECT OF INSOLVENCY ON.—The insolvency of the mortgagor or debtor cannot operate to expand the lien held by mortgagee or creditor, because mere insolvency can, of itself, in no instance, amplify a lien, whose existence and extent depend wholly upon the terms of the contract creating the lien.

CORPORATIONS—STOCKHOLDER'S LIEN ON INSURANCE MONEY.—Preferred stockholders holding a statutory lien on the property of the corporation, upon the destruction of such property by fire, have no lien upon the funds realized under policies of insurance.

CORPORATIONS—MANUFACTURING—STOCKHOLDER'S LIEN.—A lien given by statute to preferred stockholders in a manufacturing corporation upon the property of the corporation does not attach to articles manufactured for sale.

LIEN ON RENTS FROM PROPERTY.—A lien upon property does not attach to the rents derived from the property, unless specifically included.

Edgar H. Gans, Vernon Cook, and B. H. Haman, for the appellants.

Frank Gosnell and T. M. Lanahan, for the appellees.

607 McSHERRY, C. J. The contention in this case is between the holders of what is called preferred stock and creditors of an insolvent corporation.

The stockholders of the Chesapeake Guano Company, a corporation formed under the general corporation laws of this state, voted some years ago to increase the company's capital by the issue of sixty thousand dollars of preferred stock. Without pausing at this point to examine whether the method pursued was the proper one or not, it suffices for the present to say that the authorized shares were all taken. Subsequently, the company contracted the debts due to unsecured creditors and thereafter became insolvent, and its property and assets were placed in the hands of receivers. The funds now for distribution arose from sources that will be named hereafter. As the discussion requires, and the ultimate decision of the controversy involves, for **608** the first time, a judicial interpretation of the statutes under the provisions of which this stock was issued, the enactments, though somewhat lengthy, will be set forth in full. They are contained in sections 294, article 23, of the code. This section is made up of two acts of assembly passed at different periods. They are the act of 1868,

chapter 471, section 219, and the act of 1880, chapter 474. In transcribing them below, the terms of the later act will be put in italics, so that they may be easily distinguished; and more especially so that the radical changes they made in the substance of the thing with which the legislature had dealt under the earlier may be more readily perceived. The following are the words of the code: "Every corporation incorporated under the laws of this state, which has the power to issue bonds as evidences of indebtedness, and to secure the same by mortgage of the property of such corporation, or which has the power to obtain such money upon mortgage, may, whenever in the judgment of said corporation it is expedient to do so, in place of issuing such bonds and securing the same by a mortgage of the property of said corporation, or instead of obtaining money upon mortgage, issue a preferred stock for any amount for which said corporation may be authorized to issue its bonds, or for any amount which the said corporation may be authorized to obtain upon mortgage of its property, and may dispose of the said stock by sale, on such terms as it may prescribe, or by permitting the same to be subscribed for, as in the judgment of said corporation may be deemed expedient; and every corporation creating such preferred stock as aforesaid, may execute an agreement under seal, *to be acknowledged as conveyances of land are required to be acknowledged, and recorded in the office of the clerk of the circuit court for the county where the principal office of such corporation shall be situated, or in the office of the clerk of the superior court of Baltimore City, in case such office shall be situated in said city,* guaranteeing to the purchasers of, or subscribers to, such preferred stock, a perpetual dividend of six per centum per ^{ann} annum out of the profits of the said corporation payable yearly or half-yearly, as said corporation shall determine, before any dividend is distributed to any of the stockholders of the said corporation, other than the holders of said preferred stock so created; and the holders thereof shall have all the incidents, rights, privileges and immunities and liabilities, to which the capital stock of said corporation or the holders thereof, may be entitled or subject; provided, however, that no corporation shall exercise any power under this section unless the creation of such preferred stock shall be authorized by a general meeting of the stockholders of such corporation; *and the said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently*

created mortgage, or other encumbrance." The provision requiring an agreement to be executed and to be placed on record was strictly complied with. The certificates were issued and the amount subscribed was fully paid. Thereafter the debts which it is claimed ought to be paid out of the fund now in court for distribution were contracted. The fund arose in this way: The improvements on the company's property—that is, the buildings and machinery—together with the stock in trade, were insured by the corporation against loss by fire. After the receivers had been appointed these improvements and this stock, or some of it, were burned. The receivers collected the insurance. This constitutes part of the fund. The rest is made up of book accounts and rents collected by the receivers. No part of the property, real or personal, except, perhaps, stock in trade, appears to have been sold. The holders of the preferred stock—or of what is called preferred stock—issued under the above-quoted section of the code, claim that they are, as holders of those shares and in virtue of the terms of the statute, preferred creditors and entitled, in consequence, to be paid back out of these funds the amount paid in by them on their shares, whilst the persons who became creditors of the company after the recording of the ⁶¹⁰ agreement already alluded to, insist that they are entitled to be paid the debts due to them before any distribution is made to the stockholders. Thus this feature of the controversy is sharply defined.

If this stock is preferred stock, pure and simple, the contention of the creditors is right. The law is perfectly well settled that, as between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution of its assets, entitled to nothing until its creditors are first fully paid. There is a palpable difference between the relation of a stockholder and a creditor to the corporate property. Stock, whether preferred or common, is capital; and, generally speaking, a certificate of stock merely evidences the amount which the holder has contributed to or ventured in the enterprise. Such a certificate, representing nothing more than the extent of his ownership in the capital, cannot well be treated as indicating that he is, by virtue of it alone, also to the same extent a creditor who may compete with other creditors in the distribution of the fund arising from a conversion of the corporation's assets into money. He cannot, if he is simply an ordinary preferred stockholder,

in the nature of things, so far as third persons are concerned, be at one and the same time and by force of the same certificate, both part owner of the property and creditor of the company for that portion of its capital which stands in his name. His certificate, therefore, in such circumstances, merely measures the quantum of his ownership. As his chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to the capital, it is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are satisfied: *Warren v. King*, 108 U. S. 389; *Cook on Stock and Stockholders*, sec. 271; *Hamlin v. Toledo etc. R. R. Co.*, 78 Fed. Rep. 664, 47 U. S. App. 422. Whether this characteristic may be modified by statute will be considered ⁶¹¹ later on. To be strictly accurate, we ought to say there is a sense in which a shareholder is a creditor. In that sense every corporation includes its capital stock amongst its liabilities, but it is a liability which is postponed to every other liability. And as to the matured and unpaid guaranteed dividends due on preferred stock, the relation of creditor undoubtedly exists: *Baltimore etc. R. R. Co. v. State*, 36 Md. 541.

But, after all, is this particular stock, technically speaking, ordinary preferred stock, and subject consequently to the legal incidents and characteristics of that species of property?

If you call it preferred stock, and it is what you call it, then the law is perfectly clear that it has no priority over the contesting creditors. If you call it preferred stock, and it is not preferred stock, then, obviously, it is not governed by the principles applicable to preferred stock, but by those relating to the thing that it really is. The mere naming of it does not make it that which it is named, if, in fact, it is something else. Its properties and qualities determine what it is. If the statute calls it what its properties and qualities show that it is not, surely it does not thereby become what it is misnamed, and cease to be what it essentially is. Calling stock preferred stock does not per se define the rights in such stock, but these depend on the statute or contract under which it was issued: *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 233. As said by the supreme court of Ohio: "To call a thing a wrong name does not change its nature. A mortgage creditor, although denominated a preferred stockholder, is a mortgage creditor nevertheless; and interest is not changed into a dividend by calling it a dividend.

Nothing is more common in the construction of statutes and contracts than for the court to correct such self-evident misnomers by supplying the proper words. To use the language of the court in *Corcoran v. Powers*, 6 Ohio St. 19: 'The question in such cases is, not what did the parties call it, but what do the facts and circumstances ⁶¹² require the court to call it': *Burt v. Rattle*, 31 Ohio St. 116. Courts are not influenced by mere names. They look beyond these and give to the subject dealt with the character—the status—which its properties denote it possesses. The qualities and properties of a thing are its essentials; they define and mark what it is; the name is purely accidental; it is no part of the thing named. If, then, the thing which the statute contemplates possesses the characteristics and qualities of preferred stock—and possesses none other—it is preferred stock; but if, on the other hand, it possesses characteristics and qualities that are entirely foreign to preferred stock as strictly defined, and that are descriptive of something else, then the thing is obviously either not ordinary preferred stock, or not preferred stock at all, even though it be called preferred stock, and have in addition to its own qualities some of the characteristics that do pertain to preferred stock. Precisely because preferred stock has no lien on the company's property and cannot be repaid in advance of general creditors, it is necessarily true that a security which is, by express and emphatic legislative enactment, entitled to just such a lien and just such priority, is not preferred stock, technically speaking, though called by that name and though having many features incident to preferred stock. The whole ingenious and exceedingly able argument for the appellants proceeded upon the assumption that this is ordinary preferred stock, because called preferred stock, and because it possesses the incidents of such stock (but it ignored the fact that it has a quality which preferred stock has not), and the conclusion thence deduced was, that being that kind of stock it has no preferential lien. Now, the converse is exactly true. If the statute plainly gives a lien and a preference, then this so-called preferred stock is not ordinary preferred stock at all, no matter what it is called and no matter what incidents it may have in common with preferred stock, and, therefore, it has not that particular characteristic which, if it were ordinary preferred stock, would defer it to the ⁶¹³ claims of unsecured creditors. Brushing aside the name, let us see what are the essential qualities of this statutory creation.

The act of 1868, chapter 471, section 219, authorized corporations to issue preferred stock. It was an alternative method of obtaining money. Any corporation which, under its charter, had authority to borrow money and issue bonds therefor, and secure the payment of the bonds by mortgage, might, instead of resorting to that method, issue preferred stock. In issuing it the companies were empowered to execute an agreement guaranteeing to the purchasers of, or subscribers to, such preferred stock, a perpetual dividend of six per cent out of the profits of the corporation before any dividend could be paid to the holders of the common stock. The holders of such preferred stock were given all the incidents, rights, privileges, and immunities, and made subject to all the liabilities to which the holders of common stock were entitled or subject. This was strictly and technically ordinary preferred stock. It had no priority over creditors or over subsequent mortgages or encumbrances, and it had no lien on the franchises or the property of the corporation. It merely guaranteed a dividend of six per cent out of the profits—that is, the net profits—and if there were no profits there would be no dividend. Its priority was simply a priority over the usual rights and interest of another, but subordinate, class of stockholders. That is the kind of preferred stock authorized by the act of 1868, as a mere glance at its provisions—quoted in the beginning of this opinion, omitting the lines in italics—will demonstrate. In the language of the supreme court in *Warren v. King*, 108 U. S. 389: “It would be difficult to say that these statutory provisions allowed any preference in shares of capital stock, except a preference amongst classes of shares, or any preference of any class over creditors. . . . There is nothing in the certificate that clothes them with a single attribute of a creditor.” The stock authorized by the act of 1868 was not only called preferred stock, but ⁶¹⁴ it had every incident of stock, and none that was not. For twelve years the statute remained unchanged. Shares issued under it were, as we have said, essentially shares of capital with none of the qualities of an evidence of debt, and shareholders were simply owners of the capital, with none of the rights of creditors of the company. But in 1880 the statute was amended by the addition of the words in italics. By the provision requiring the agreement to be recorded no change was effected in the relation of the preferred to the common shareholder—the former was given no greater right over the latter than he had before the agreement was

required to be recorded—and the relation of the preferred shareholder to the company's subsequent creditors was not disturbed unless the last clause, giving the shareholder a lien and declaring a preference in his favor, altered the nature of the preferred stock and made it something that it had not been under the act of 1868. If the clause giving the shareholder a lien and a priority did not create a new species of preferred stock, or a security differing radically from ordinary preferred stock, it is difficult, if not impossible, to assign any reason for the adoption of the act of 1880. The clause specifically declaring that "the said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage or other encumbrance," essentially changed the whole nature of the thing antecedently described as preferred stock, and the statutory lien converted it into something wholly different. The statute says "said preferred stock"—not the guaranteed dividend thereon—shall be and constitute a lien on the property and franchises of the company. If you say the lien only extends to the dividend, then you say the stock shall not be a lien, though the legislature said it should be.

Preferred stock, under the act of 1868, had no lien whatever; this statutory preferred stock, under the act of 1880—"the said preferred stock"—has a lien on franchises and on property. Preferred stock under the act of 1868 had ⁶¹⁵ no priority over creditors; this statutory preferred stock under the act of 1880 has priority over subsequent mortgages and encumbrances. The two are therefore intrinsically different, and the argument that gives to the latter no greater effect or wider range than the former possessed, simply because of the identity in the name applied to both, must totally ignore and in fact expunge the clause of the statute expressly creating the lien. If this statutory preferred stock has a lien, then it differs from ordinary preferred stock in that it has the lien. If, because it is called preferred stock, it has no lien, though the statute says it shall have, then the name controls the substance, and the lien expressly given is simultaneously taken away by the name conferred. Either the name or the substance must yield, and certainly the latter cannot be made subordinate to the former.

Giving to the holder of what the act of 1880 designates preferred stock, a lien is not without precedent. It can be done, and the ultimate question always is, Has it been done? That

it can be done a few citations will show. In Elliott on Railroads, section 85, the general rule is thus stated: "Unless a preference in payment of capital invested has been specially contracted for (In re Bangor etc. Co., L. R. 20 Eq. 59; In re Bridgewater Nav. Co., L. R. 39 Ch. Div. 1), or is given by statute (McGregor v. Home Ins. Co., 33 N. J. Eq. 181), the holder of the preferred stock shares equally with the common shareholders in a distribution of assets upon dissolution This results from the rule that he is a stockholder and not a creditor." "But much," the same author proceeds to observe in section 86, "will necessarily depend upon the language used, and where the interest is guaranteed absolutely and the corporation also agrees to liquidate the principal at a specified time, or the like, so that the so-called stock is in reality an interest bearing debenture, the relation created thereby will be that of debtor and creditor, and the holder will not be merely a stockholder as he would be if it were preferred or interest bearing stock" ¹¹⁶ payable only out of the profits: Burt v. Rattle, 31 Ohio St. 116; West Chester R. R. Co. v. Jackson, 77 Pa. St. 321; Totten v. Tison, 54 Ga. 139. Its validity, therefore, would depend upon some other power than the power to issue preferred stock." And in Cook on Stock and Stockholders, section 271, it is said: "A mortgage to secure preferred stock and dividends thereon has been upheld in a few cases. In other cases that which was called preferred stock was nothing more than income bonds with a voting power." In the case of Garrett v. May, 19 Md. 191, the late Mr. Reverdy Johnson, in his argument, spoke of the "income bonds," which were there the subject of controversy, as equivalent to preferred stock. As the interest and principal of the bonds were payable out of income, it meant net income. "The holder," he said, "is thus made only a preferred stockholder." "Occasionally, however," remarks Mr. Cook (Cook on Stock and Stockholders, sec. 271), "a mortgage is given by the corporation to secure the payment of dividends on preferred stock and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage could be legal except when it is issued under express statutory authority." In West Chester R. R. Co. v. Jackson, 77 Pa. St. 321, it was said by Judge Woodward, speaking for the court: "A corporation may issue new shares and give them a preference as a mode of borrowing money, where it has power to borrow on bond and mort-

gage, as preferred stock is only a form of mortgage." In *Skiddy v. Atlantic etc. R. R. Co.*, 3 Hughes, 355, it was held that where preferred stock had been issued, reciting that the stipulated interest was a lien on all the property of the corporation after the first mortgage, the lien would be upheld by the court as against subsequent mortgages and general creditors, though such lien had not been secured by any mortgage.

There ought, then, to be no doubt that this method of creating a lien in favor of a stockholder can be resorted to, if the legislature sees fit to authorize it. That it has authorized ⁶¹⁷ it by the terms of the act of 1880, hereinbefore transcribed and put in italics, is, it seems to us, perfectly clear. The general assembly has, in plain and unmistakable words, declared that this particular kind of stock—the "said preferred stock"—shall be and constitute a lien on the company's property. No language could be more explicit; and, most certainly, courts have no authority to reject or to disregard it. Stock issued under this act is consequently a lien on the property of the company issuing it, and entitled to the preference which the statute gives it.

It is no answer to say that the giving of such a lien is nugatory by reason of a lien being inconsistent with the properties and qualities of stock; because it is quite obvious that after a lapse of twelve years the legislature, by adopting the act of 1880, intended to do just what it did do, even though in doing it the nature of the thing dealt with was changed and a new and entirely different statutory preferred stock was created. That it had the power to do this cannot be disputed. There was neither physical nor legal impossibility in the way; and no principle of sound and enlightened public policy was invaded. The substance of the thing was changed, the name was retained.

Much was said in the argument, and something is to be found in the books, about such liens in favor of stockholders being void because against public policy; but Sir George Jessel, M. R., in dealing with that indefinite and variable quantity called public policy, said in *Printing etc. Co. v. Sampson*, L. R. 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this para-

mount public policy to consider—that you are not ⁶¹⁸ lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit crime, or a contract to give a reward to another to commit crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offense, or to give money or reward to another to commit an immoral offense, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further.” In the case of *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, the supreme court had under review the act of Congress of July 2, 1890, enacted “to protect trade and commerce against unlawful restraints and monopolies.” It was argued that the impolicy of giving to the act the construction which its language plainly conveyed was so clear that it could not be supposed Congress intended the natural import of the words it had used; but a majority of the court, speaking through Mr. Justice Peckham, said: “The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.” It is impossible to see how the lien given to this peculiar preferred stock can be treated as invalid on the ground that it contravenes public policy, since the explicit words of the statute declare a policy with which the lien that is given is essentially in accord. It must be, said this court in *Trust Estate of Woods*, 52 Md. 520, a very plain case to justify a court in holding a contract to be against public policy. We are dealing now, not with a contract, but with a statute.

None of the cases cited by the appellant’s counsel arose upon statutes containing such a provision as is set forth in the act of 1880. They are for that reason distinguishable ⁶¹⁹ from this case. They all dealt with ordinary preferred stock, and not with stock issued under a special legislative enactment declaring that stock created thereunder shall be and constitute a lien on the company’s property and shall have priority over subsequent mortgages and encumbrances.

If this statutory preferred stock has priority over any subsequently created mortgage or encumbrance, it must have

priority over the claims which such subsequently created mortgage would itself have precedence over. It would be a solecism—an incongruity—to say that the stock shall have priority over subsequently created mortgages and, of course, therefore, over those claims which would be deferred to such mortgage, where there is one; and yet shall have no priority over the same claims where there is no mortgage. Obviously, the statute means a priority over subsequent mortgages and over such claims as such subsequent mortgages would have preference over. Suppose these claims were secured by a mortgage executed after the issue of the stock. Would not the mortgage be postponed, by the express terms of the statute, to the prior lien of the stock? Can claims, when unsecured by a mortgage, take precedence of the stock to which they would be subordinate if they were in the form of a mortgage? If they can, it must be solely because when unsecured they are given a priority which is denied them when they are secured; thus reversing the ordinary rule and placing an unsecured claim in advance of a secured one. The statute cannot be interpreted in a way to produce such a result.

We now come to the inquiry as to whether the stock was properly issued. The statute prohibits the issue of this kind of stock “unless the creation of such preferred stock shall be authorized by a general meeting of the stockholders of” the corporation. It is objected that a general meeting of stockholders was not properly called, because: 1. The meeting which did assemble was called by the directors and not by the stockholders; and 2. Because notice was given in but one instead of in two newspapers. This ⁶²⁰ objection is founded on section 6 of article 23 of the code, and altogether disregards section 76 of the same article. Section 6 permits stockholders to call a general meeting only when the president and directors refuse to call it after being required by the stockholders to do so. The notice prescribed by section 6 is ten days, and when the corporation is located in Baltimore City, this notice must be published in two newspapers. Upon turning to section 76 it will be found that provision is made for calling a meeting of the stockholders for the purpose of increasing or diminishing the amount of the capital stock. This notice must be given by the directors or a majority of them; it must be published in one paper, and a copy must be mailed to each stockholder; and the length of the notice must be four weeks. All the provisions of section 76 were strictly complied with. Whilst section 6 provides generally for calling meetings of stockholders, section 76 provides specially

for the case of a meeting called for a particular purpose. The general provision must yield to the particular, when the thing to be done is that which the latter has relation to. The proviso requiring a general meeting of stockholders to authorize the issue of preferred stock was contained in the act of 1868, before the amendment of 1880. The issue of preferred stock under the act of 1868 was necessarily an increase of the capital, and the proper method to be pursued in calling a meeting of the stockholders to determine whether such preferred stock should be issued was the one pointed out in section 76. The changes made by the act of 1880 in the characteristics of this stock did not change the mode to be followed in securing the sanction of the stockholders to its issue. As that mode—the one designated in section 76—was strictly followed, the objection founded on the failure to comply with section 6 must fall.

This brings us to the only other question in the case, and that is whether the sums collected by the receivers from the various sources indicated above can be claimed by the holders of this preferred stock, or must be paid to ⁶²¹ the unsecured creditors. If the fund collected from the insurance companies is payable to the stockholders rather than to the unsecured creditors, it must be so payable, because the lien on the franchises and property of the company is, by reason of its being a lien on the franchises and property, a lien on the money paid by the insurance companies to the receivers, under the policies indemnifying the guano company against loss by fire. But since the decision by Lord Chancellor King, in the case of *Lynch v. Dalzel*, 3 Brown P. C. 497, it has never been disputed that a policy of insurance against loss by fire is only a personal contract of indemnity against a possible loss on account of the interest of the insured in the thing mentioned in the policy. Such personal contracts of indemnity do not attach to the realty or in any manner go with the same, as incident, by any conveyance or assignment, unless there is, in addition, some special stipulation to that effect between the insurer and the insured: *Washington Fire Ins. Co. v. Kelly*, 32 Md. 441, 3 Am. Rep. 149; *Wheeler v. Insurance Co.*, 101 U. S. 442; *Insurance Co. v. Stinson*, 103 U. S. 29; *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189, 55 Am. St. Rep. 387. Consequently, a mortgagee, and for the same reason any other lien creditor, has no right to claim the benefit of a policy underwritten for the mortgagor or owner of the property, unless there is an express agreement permitting it. The insolvency of the mortgagor or

debtor cannot operate to expand the lien held by the mortgagee or creditor, or bring within the scope of that lien a fund which, according to settled principles, is not subject to its operation. If the proceeds of such a policy are not covered by the lien which the creditor holds, the subsequent insolvency of the debtor cannot bring them under the lien; because mere insolvency can, of itself, in no instance, amplify a lien, whose existence and extent depend wholly upon the terms of the contract creating the lien. There is no pretense that there was any special stipulation between the guano company and the preferred stockholders appropriating to the latter, in the event of a ⁶²² loss by fire, the funds which might be realized under the policies of insurance; and it, of course, follows that these stockholders have no lien upon those funds, and, having no lien upon them, they have no claim to them; because these stockholders are not general creditors, and have no right to appropriate to the payment of their stock any assets other than those which the statute specifically subjects to their lien, until the general and other creditors are first fully paid.

With regard to the book accounts collected by the receivers the record discloses very little. Presumably, these book accounts represent sums due to the company for merchandise sold by it. It does not appear at what time this merchandise was acquired, but it was probably long after the creation of the preferred stock. However this may be, it cannot be held that the money when collected was covered by the lien given by the statute, unless the merchandise sold for that money was itself subject to that lien when sold. It cannot be successfully contended that the lien attached to merchandise which the company was engaged in making for sale, without at the same time conceding that every article sold went into the possession of the purchaser charged with the lien. In a manufacturing concern engaged, as the name implies, in the sale of fertilizers, it could never have been the purpose of the statute to attach the lien to the articles produced for sale, as such a lien would effectually prevent any sale and would at once, as a consequence, stop the very business which the company was organized to conduct.

Lastly, with respect to the rents. The lien given by the statute attaches to the franchises and property. Were the lien that of a mortgage on land, the specific thing pledged would be the land. Rents, unless specifically included, would not be conveyed by a pledge of the land; "they belong to the tenant in possession, whether a mortgagor or a third person claiming

under him": *Kountze v. Omaha Hotel Co.*, 107 U. S. 378. In *Freedman's Saving etc. Co. v. Shepherd*, 127 U. S. 494, it appeared that one Bradley executed ⁶²³ a deed of trust pledging to the savings and trust company certain real estate. The rent accruing from this property was claimed by the trust company and by other creditors of Bradley. In denying the claim of the trust company the supreme court said: "Bradley's deed pledged the property, not the rents accruing therefrom, as security for the payment of his notes": See, also *Gilman v. Illinois etc. Tel. Co.*, 91 U. S. 603. It is true that when possession is taken by a receiver in behalf of the mortgagee the rents may be appropriated to the payment of the mortgage debt (*Teal v. Walker*, 111 U. S. 242), but this lien given under the statute to a preferred shareholder is not the lien of a mortgage, and cannot be expanded so as to include anything more than the legislature designated, namely, franchises and property.

From what has been said it results that, in our opinion, the so-called preferred stock is a lien on the company's franchises and property owned at the time the stock was issued; but that it is not a lien on the funds now in the hands of the receivers and arising from the sources hereinbefore indicated. In so far as the decree below declared the preferred stock a lien on the franchises and property of the Chesapeake Guano Company, it is affirmed; but in so far as it awarded the funds collected from the insurance companies, from the book accounts and from the rents of the property, to the preferred stockholders, it will be reversed.

Decree affirmed in part and reversed in part and cause remanded that a new decree conforming to this opinion may be signed. The costs to be equally divided between each side.

CORPORATIONS—WITHDRAWAL OF CAPITAL STOCK.

When a corporation incurs debts, a contract arises with the creditors that the capital stock shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied: Note to *Buck v. Ross*, 57 Am. St. Rep. 66, where the subject of withdrawal of the assets of a corporation is treated at length.

MORTGAGES.—A mortgagee has no right to the rents and profits of the mortgaged property, in the absence of a stipulation in the mortgage: Note to *Hardin v. Hardin*, 27 Am. St. Rep. 793.

AN ASSIGNMENT OF MORTGAGED PREMISES BY AN INSOLVENT MORTGAGOR, made before foreclosure and while the rents and profits belong to him, gives to the assignee the right to receive and apply the same as provided in the assignment; and in his action to foreclose, the mortgagee is not entitled to have a receiver appointed *pendente lite* to collect the rents and profits, to be applied to the payment of the mortgage debt, merely because

of the insolvency of the mortgagor and the insufficiency of the premises to pay such debt: *Seignious v. Pate*, 82 S. C. 134, 17 Am. St. Rep. 846.

A MORTGAGEE HAS NO INTEREST IN AN INSURANCE EFFECTED BY THE MORTGAGOR upon the mortgaged premises for his own benefit, there being no agreement requiring the latter to insure for the benefit of the former: *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219.

What is Preferred Stock and What are the Special Rights of Its Holders.

In this note we shall treat merely of what preferred stock is, the various kinds, and its essential features, and the rights and liabilities of the holders of such stock, excluding all mention of the power of a corporation to issue preferred stock, when it may be issued, and who may object thereto. *

Preferred Stock is nothing more than ordinary corporate stock, with a right to a dividend before any should be made upon the common stock. Its peculiar and distinguishing characteristic is that it is entitled to a priority over other stock in the distribution of dividends: *Chaffee v. Rutland R. R. Co.*, 55 Vt. 110. As between stockholders themselves, other priorities may attach to this stock: *Totten v. Tison*, 54 Ga. 139; but this is unnecessary. The right to receive dividends from earnings before the common stock can share in such earnings is essential, however. The mere calling of stock "preferred stock" does not make it such, if, in reality, it is something else. To call a thing by a wrong name does not change its nature. One may be called a stockholder when his rights are those of a creditor, and one may be paid what is in name a dividend, when in fact it is nothing but interest: *Burt v. Rattle*, 31 Ohio St. 116; *Pittsburgh etc. R. R. Co. v. Allegheny County*, 79 Pa. St. 210. As is said in the principal case, "calling stock preferred stock does not per se define the rights in such stock, but these depend on the statute or contract under which it is issued." So that if stock, though called preferred, creates rights other than a priority over other stockholders, it is to that extent something different from preferred stock.

Preferred stock may be given different names, such as "preferred stock," "guaranteed stock," and "interest-bearing stock," which are essentially the same to-day, though at one time deemed to be different: See *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Field v. Lamson etc. Mfg. Co.*, 162 Mass. 388; *Lockhart v. Van Alstyne*, 31 Mich. 75, 18 Am. Rep. 156. In what particulars they have been held to be different will be noted later. Massachusetts, by statute, has authorized a species of stock denominated "special stock," which is something very different from ordinary preferred stock, and will be noticed in a subsequent part of this note.

Preferred Stockholders as Creditors.—There is one sense in which stockholders, common as well as preferred, are creditors. It is in the sense that a corporation includes all its capital stock among its liabilities, but it is a liability which is postponed to every other

liability. As such a creditor, a stockholder is subordinate to every other creditor of the corporation. In the ordinary sense, however, a stockholder cannot be a creditor of the corporation by virtue of his ownership of stock: *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445. One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation: *Hamlin v. Toledo etc. R. R. Co.*, 78 Fed. Rep. 664. The difference between preferred stockholders and creditors was well stated in *Miller v. Ratterman*, 47 Ohio St. 141: "The relation of a holder of preferred stock is, in some of its aspects, similar to that of a creditor, but he is not a creditor save as to dividends after the same are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor. He cannot, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent; if the latter, he takes no interest in the company's affairs, is not concerned in its property, or profits as such, but his whole right is to receive agreed compensation for the use of money he furnishes, and the return of the principal when due. Whether he is one or the other depends upon a proper construction of the contract he holds with the company."

Guaranteed or preferred stock is not a debt, but a dividend, and its holder can have no action against the company as for a debt, but his right is to a dividend. Preferred stock is not an indebtedness which can be considered in determining whether the obligations of a railroad company are such as to prevent its operating an additional train: *People v. St. Louis etc. R. R. Co.*, 176 Ill. 512. Stipulated interest on stock cannot become a debt payable absolutely, which the stockholder can recover regardless of the profits applicable to its payment: *Barnard v. Vermont etc. R. R. Co.*, 7 Allen, 512; *Chaffee v. Rutland R. R. Co.*, 55 Vt. 110. When stock is guaranteed to pay certain dividends, it is not a debt that is guaranteed but a dividend, and if no profits are made, no recovery can be had by a preferred stockholder: *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575. The certificate of stock is, nevertheless, a contract with the stockholder, and the relation of debtor and creditor is created to the extent that his right and claim against the corporation growing out of his contract cannot be changed without his consent: *McLaughlin v. Detroit etc. Ry. Co.*, 8 Mich. 100. The holder of preferred stock is not such a creditor that he can sue at law to recover payment of a guaranteed dividend: *Williston v. Michigan etc. R. R. Co.*, 13 Allen, 400.

The issuance of preferred stock is a device resorted to very largely in the reorganization of railroad corporations. The exigencies of the situations in which these corporations have been placed have been such that the greatest security must be offered to induce capital to come to their help. Accordingly, attempts have been

made to issue stock which shall at once prefer its owners to the holders of common stock and protect them against any subsequent indebtedness of the corporation by giving their claims priority over subsequent creditors. These attempts have in the main proved futile, the courts holding that, as a matter of public policy, a stockholder could not claim an interest in the property of a corporation paramount to the rights of creditors, whatever rights he might have in relation to his fellow stockholders. Accordingly, where stock was entitled to preferred dividends out of the net earnings of a road, "after payment of mortgage interest and delayed coupons in full," it was held that the holders of such stock were not entitled to dividends prior to payments on account of new leases of connecting roads or of additionally borrowed money: *St. John v. Erie Ry. Co.*, 10 Blatchf. 271; affirmed in 22 Wall. 136. To the same effect see *Mercantile Trust Co. v. Baltimore etc. R. R. Co.*, 82 Fed. Rep. 360, where preferred stockholders were allowed no priority over the claims of subsequent creditors. And in *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367, a preferred stockholder was not allowed to share in surplus money in the treasury of the corporation in accordance with an agreement, where it would work gross injustice to creditors: See, also, *Phillips v. Eastern R. R.*, 138 Mass. 122. The attempt has been made to make preferred shares of stock a lien on the corporate property paramount to all claims except the first mortgage on the property. But it is held that a corporation cannot, in the absence of statutory authority, make its preferred stock a lien upon its property; nor can an agreement between the subscribers to the stock of the corporation make such stock a lien on its property, as against bondholders or general creditors without notice of such agreement: *Continental Trust Co. v. Toledo etc. R. R. Co.*, 72 Fed. Rep. 92. In a similar case, *Hamlin v. Toledo etc. R. R. Co.*, 78 Fed. Rep. 664, where a lien to preferred stockholders was given subsequent only to a first mortgage, the court said: "If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby." *Continental Trust Co. v. Toledo etc. R. R. Co.*, 86 Fed. Rep. 929, is not in conflict with this case, but directly approves it, and the statement in the syllabus of the case that "a corporation may issue preferred stock which shall be a lien upon its property and earnings second only to an existing first mortgage," does not mean that such stockholders are creditors with a claim on corporate property and assets superior to that of subsequent creditors, but signifies merely that preferred stockholders have a priority over common stockholders in the distribution of capital: See *Mercantile Trust Co. v. Baltimore etc. R. R. Co.*, 82 Fed. Rep. 360. Creditors of a corporation, abandoning their position as such and becoming holders of preferred stock, lose their rights as creditors of the corporation,

and assume the same position as other stockholders toward existing and future indebtedness: *Warren v. King*, 108 U. S. 389. It is possible, however, for one to be a real creditor, though called a preferred stockholder; and where one advances money to a corporation, receiving therefor certificates secured by a mortgage, these certificates to receive a guaranteed "dividend," and to be repaid at a stated time, the holder taking no interest or risk in the affairs of the company, but having a right to exchange his stock for common stock, such so-called "dividend" is interest, the transaction is a loan, and the preferred stockholder is a creditor, and calling him by a different name cannot change his essential character: *Burt v. Rattle*, 31 Ohio St. 116. Preferred stock may be given a lien on the property of the corporation superior to any right the common stockholders may have in it, and, after an acquiescence of ten years, common stockholders cannot object to such a lien on the final distribution of the property of the company: *Toledo etc. R. R. Co. v. Continental Trust Co.*, 95 Fed. Rep. 497. Preferred stock may also have a priority over a subsequent debt, when such subsequent creditor agrees thereto: *Skiddy v. Atlantic etc. R. R. Co.*, 3 Hughes, 320. A corporation may mortgage its property to secure to preferred stockholders the payment of dividends guaranteed, but such stockholders cannot in this way be given priority over corporation creditors, either existing or subsequent: *Miller v. Ratterman*, 47 Ohio St. 141. While preferred stock has no lien on the property of a corporation, and the parties themselves cannot create such a lien so as to encroach upon the rights of existing or subsequent creditors, yet a statute may authorize such a lien, which will be paramount to the rights of subsequent creditors. This lien would not be against public policy, for, under such circumstances, the statute creates the public policy, and the holders of such stock are changed from their character as stockholders and become, to the extent of their lien, real creditors of the corporation. As stockholders they are not creditors, but as holders of a statutory lien they become such: See the principal case.

Preferred stockholders possess some rights which, at least, approach those of a creditor. A corporation is not required to pay all its debts before a dividend should be declared, and if the financial condition of a corporation is such that a right to a dividend is clear and could be declared without injury to creditors or to the corporation, although there may be outstanding debts, then preferred stockholders can require that a dividend be declared and a court of equity will enforce their demand: *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445. In *Nickals v. New York etc. R. R. Co.*, 15 Fed. Rep. 575, it was held that while preferred stockholders were not creditors, yet their rights were so far superior to those of common stockholders as to enable them to compel a division of profits, which the board of directors had determined to accumulate. This case was reversed in 119 U. S. 296, where it was held that preferred stockholders could

not compel the declaring of a dividend as of right, but only where the directors ought to declare a dividend, and that whether a dividend should be declared in any year is a matter belonging, in the first instance, to the directors themselves to determine. To this extent, then, the doctrine of the original case is modified, and the rights of preferred stockholders are less like those of a creditor. The case of *Storrow v. Texas etc. Mfg. Assn.*, 87 Fed. Rep. 612, decided in the circuit court of appeals for the fifth circuit, materially extends the rights of preferred stockholders as creditors with reference to the profits of the corporation. The court said: "So far as the face value of the preferred stock is concerned, it is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown that there were profits wherewith to pay it, and becomes a lien prior to the rights of the holders of common stock upon the net earnings, if there were such, for the amount of the dividend, and can be followed wherever invested by the company."

Rights of Preferred Stockholders as Stockholders.—In General, a preferred stockholder possesses all the rights and is subject to the general liabilities of ordinary stockholders: *Miller v. Ratterman*, 47 Ohio St. 141. Failing in their attempt to create for themselves rights in the property of the corporation superior to those of subsequent creditors, preferred stockholders laid claim to being the entire corporation. This contention was denied in *Higgins v. Lansingh*, 154 Ill. 301, in a case where the preferred stock was authorized and created by the holders of common stock, and the holders of common stock had for more than twenty years elected managers and performed all other acts as stockholders of the company. Where preferred stockholders are the only ones allowed to vote, they become in effect the entire corporation: *Mackintosh v. Flint etc. R. R. Co.*, 32 Fed. Rep. 350. The rights of preferred stockholders, as of those of common stockholders, depend upon their contract with the corporation, whether such contract is evidenced by a certificate or is found in the by-laws: *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445. A holder of stock has a right to have such stock set forth the fact of preference: *State v. Cheraw etc. R. R. Co.*, 16 S. C. 524. See *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445. The rights of preferred stockholders resting upon contract, the preference fixed by such contract cannot be changed without their consent: *Pronik v. Spirits Distributing Co. (N. J. Eq.)*, 42 Atl. Rep. 586; *West Chester etc. R. R. Co. v. Jackson*, 77 Pa. St. 321; *Ashbury v. Watson*, L. R. 30 Ch. Div. 376. Where, however, a corporation leased its railroad line to another corporation, the lessee guaranteeing a certain dividend on the stock of the lessor, the amount of this dividend guaranteed may be changed by a subsequent contract between the corporations, and a stockholder cannot object. The rights of the stockholder depend on the contract between the corporations, to which contract he was not a party and a change in which he

cannot prevent: *People v. Metropolitan etc. Ry. Co.*, 26 Hun, 82. Where the by-laws allow a change in the privileges pertaining to preferred stock, or a stockholder assents to such change, such a change is valid and the holder is bound thereby: *Compton v. The Chelsea*, 128 N. Y. 537; affirming 13 N. Y. Supp. 722. Holders of preferred stock have no special control over the corporation or its management. And where a corporation has power to perform certain acts, such acts may be done, and preferred stockholders have no ground to object, though the act or contract entered into was detrimental to their interest: *Thompson v. Erie Ry. Co.*, 42 How. Pr. 68. Though preferred stock is entitled to quarterly or semi-annual dividends, these dividends must be declared in accordance with statutory authority. And where the statute provides that, in the absence of days fixed in the charter or by-laws on which dividends may be declared, they must be declared in January, dividends on preferred stock are subject to this limitation, and directors have no power to declare quarterly dividends on such stock on days selected in their discretion: *Marquand v. Federal Steel Co.*, 95 Fed. Rep. 725.

Right to Dividends.—A dividend is money paid out of profits by a corporation to its shareholders. A preferred dividend is that which is paid to one class of shareholders in priority to that to be paid to another class: *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575. Preferred stockholders are entitled to dividends before the holders of common stock can be paid anything. But it is well established that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends. Such dividends are not payable absolutely and unconditionally as interest is, but only out of profits made by the company. The preference is limited to profits whenever earned: *Chaffee v. Rutland R. R. Co.*, 55 Vt. 110. The proprietorship of a preferred stockholder in the net earnings of a corporation is a right to receive from them so much a year, if earned, before the common stock receives any dividend therefrom: *Warren v. King*, 108 U. S. 389. In Virginia, however, it has been held that dividends on guaranteed stock should be paid from gross earnings, instead of net earnings, under a statute allowing an increase of capital stock for the purpose of liquidating all arrears of debts, interest, and dividends, by the issue of guaranteed stock, where the corporation was in dire need of funds, extraordinary inducements were necessary to secure the requisite amount of money, and no dividends were possible unless paid from gross earnings. The legislative intent and the obvious purpose of the statute were deemed controlling, and public policy was not violated by following the statute: *Gordon v. Richmond etc. R. R. Co.*, 78 Va. 501. All the holders of preferred stock are entitled to dividends, although some may be entitled to a less dividend than others: *Coe v. Belfast etc. Ry. Co.*, 2 I. R. C. L. 112.

The income of a corporation may be so adjusted that the preferred stock will entirely absorb it, leaving nothing for the holders of

common stock, and such an arrangement will be upheld. This was asserted in a case in which a railroad leased its line at a fixed annual rental, the amount of the rental being four per cent on the preferred stock, to be paid directly to the holder thereof.

The question has arisen many times as to the power of directors to employ the net earnings of the corporation in improvements and extensions, to the prejudice of preferred stockholders. As a general rule, the directors of a corporation have the discretionary power to determine not only the amount of all dividends, including the dividends on preferred stock, but also the circumstances under which they will or may declare them. In *Nickals v. New York etc. R. R. Co.*, 15 Fed. Rep. 575, the contention of preferred stockholders was upheld, and their equitable right to have a dividend declared when there were net profits was sustained. The theory upon which this claim was allowed was this, that preferred stockholders had a property right in net profits paramount to that of all other stockholders, and, the dividend of preferred stockholders not being cumulative, to take the dividend to which they were entitled and use it for improvements for the purpose of increasing future dividends would be taking the profits of one set of stockholders and using them for the benefit of another. This a corporation cannot do. And while the directors can generally expend profits in the interest of the corporation instead of declaring a dividend, this cannot be done to the prejudice of one set of stockholders. On appeal, this case was reversed, however, and the supreme court of the United States upheld the power of directors as against the rights of preferred stockholders. In this case (*New York etc. R. R. Co. v. Nickals*, 119 U. S. 296), Justice Harlan pointed out clearly how the interests of the corporation and the public are better subserved by denying to preferred stockholders any claim to profits, except as declared by the directors of the corporation. In the course of his opinion he said: "The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith upon the part of the directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when, in good faith, believed to be necessary, for the preservation or improvement of the property intrusted to its control."

The rule undoubtedly is, that the directors have the discretion in the first instance to provide for the payment of indebtedness and

for making improvements before they are required to declare a dividend on net earnings for the benefit of preferred stockholders. The rule was applied in *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445, where the discretion of directors in placing eleven thousand dollars net earnings in a sinking fund to apply on the payment of eighty-eight thousand dollars due in three years was upheld as a proper act which could not be objected to by preferred stockholders. Preferred stockholders, entitled to receive interest after payment of mortgage interest, are not prejudiced by the action of directors in issuing mortgage bonds consolidating prior and subsequent indebtedness: *Thompson v. Erie Ry. Co.*, 11 Abb. Pr., N. S., 188.

While the rule is well established that the discretion of directors cannot generally be interfered with, and this rule is sound and conduces, in the main, to the best interests both of the corporation and of its stockholders, yet there exists, and the rule aids in furnishing, an opportunity to perpetrate fraud on the holders of preferred stock, and fraud under the guise of fair dealing and of the exercise of an honest discretion, which for this very reason renders it impossible for courts to deal with successfully. This is true only when dividends on preferred stock are noncumulative, since, if dividends are cumulative, preferred stock will eventually receive its just share if dividends are ever declared. Where dividends are nonaccumulative and the corporation is in the control of the holders of common stock, there is every inducement and every opportunity to declare no dividend, unless the net profits are sufficient to declare a dividend on both preferred and common stock. If the profits are insufficient for that purpose, improvements and extensions of the business can be provided for with safety, because the interest of preferred stockholders is not cumulative, and a charge of fraud is difficult to establish as against real improvements and beneficial extensions. In *McLean v. Plate Glass Co.*, 159 Pa. St. 112, where certain large indebtedness consisted of charges for extensions of the business, the directors applied net profits to the payment of such indebtedness instead of declaring a dividend. In sustaining the action of the directors the court said: "The directors are far better able to judge what is the best policy, and for the best interests of all, in determining how far the earnings ought to be applied to the reduction of indebtedness rather than to the payment of dividends. As a rule, it is always a measure of sound policy to discharge corporate indebtedness rather than to divide the earnings among the stockholders, allowing the indebtedness to remain. The stockholders are almost certain to obtain larger advantages and returns in the future, especially where, as here, the property, works, and business were so greatly enlarged by the expenditure in question." There was no pretense of any bad faith in this case.

There is, however, a limit to the discretion of a board of directors

as to what use they will put profits to, whether to declare a dividend or use them in the business of the company. "The courts will not allow the directors to use their power oppressively by refusing to declare a dividend while the net profits and character of the business clearly warrant it": *Storrow v. Texas etc. Mfg. Assn.*, 87 Fed. Rep. 612. The discretion of the directors may be limited by the charter of the corporation: *Mackintosh v. Flint etc. R. R. Co.*, 34 Fed. Rep. 582, 600. Under a special statute, permitting a corporation to raise money either by selling second mortgage bonds or by issuing preferred stock entitled to a certain annual dividend, it was held that holders of the preferred stock issued had more rights than ordinary preferred stockholders, and were entitled to a dividend before arrearages in indebtedness should be paid, although this prior deficiency amounted to several hundred thousand dollars: *Cotting v. New York etc. R. R. Co.*, 54 Conn. 156. All the debts of a corporation need not be paid before a dividend can be declared. Frequently, a dividend may be enforced by stockholders, notwithstanding a large indebtedness. Everything depends on the character of the indebtedness and the condition of the corporation. In commenting upon the theory that there can never be any available income, or any profit, as long as there is any debt remaining unpaid, Lord Hatherley said, in *Mills v. Northern etc. Ry. Co.*, L. R. 5 Ch. App. 621: "If that be so, I suppose there is hardly a railway company in the kingdom which could pay any dividends at all to their shareholders. I fancy there are very few, indeed, which have not debentures in some shape or other; and if all those are to be paid before a single sixpence could be paid in dividend, of course the companies would be in a very different position from what they suppose themselves to be in. . . . The shareholders, especially those who are guaranteed preference shareholders, are not to be told that all these things [permanent expenditures] are to be paid for before they are to have any dividend out of the income." In *Hazeltine v. Belfast etc. R. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, preferred stockholders compelled the declaration of a dividend, and the court held them entitled to the distribution of a fund, instead of such fund being reserved as a sinking fund, where the business of the corporation was guaranteed, its income was fixed, its expenses were nominal, and its only debt a permanent bonded debt secured many times over, and which could be renewed.

Guaranteed Dividends and preferred dividends to-day amount to practically the same thing. In the early history of railway reorganization, and spurred by the necessities of these corporations, contracts were entered into which purported to give to the word "guarantee" a wider significance, and to pledge to the holders of guaranteed stock the payment of dividends in any event, whether the corporation earned any profits or not. But the courts in denying such an interpretation say that it is a dividend, and not a debt, which is preferred and guaranteed, and that if there are no funds

legally applicable to the purposes of a dividend there can be none. The guaranty is limited to the profits made by the corporation: *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575. Judge Cooley, in *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156, points out how such an interpretation is opposed to public policy. He says: "The guaranty in this case is understood to go farther, and not only give a preference in the division of profits, but to entitle the holder to such an apportionment of the assets of the corporation from year to year, when there are no profits, as may eventually consume the whole, leaving the other stockholders nothing. It is not a mere preference that is given to the holders under this construction; it is a preference with a perpetual promise to pay the largest interest permitted by law on the sum invested by them, profits or no profits; so that the holders shall have at the same time all the advantages of stockholders and of creditors, while their associates are postponed as stockholders, and, considered as representing the debtor corporation, they are deprived by the very contract itself of any reasonable probability of restoring the standing and strength of the corporation when once it shall have ceased to be steadily and continuously prosperous. For an agreement to pay semi-annual dividends from earnings when there are any, and from capital when there are not, is only a new form of the undertaking by which the debtor is to pay from his profits if the ship comes in, and from the pound of flesh if it does not; every dividend from the capital being an attack upon the very life of the corporation, before which, under ordinary circumstances, it must inevitably and speedily give way." "A contract which would require dividends when honesty and good faith to the public would forbid, and public opinion condemn them, which would antagonize the positions of different classes of men engaged in the same joint undertaking, and preclude harmony of action and union of effort, precisely under those circumstances when harmony and union would be most essential, . . . must necessarily be opposed to public policy and void." See further as holding that the word "guaranteed," as applied to preferred stock, does not import an absolute liability, but is dependent on net profits, *Field v. Lamson etc. Mfg. Co.*, 162 Mass. 388; *Miller v. Ratterman*, 47 Ohio St. 141; *Williston v. Michigan etc. R. R. Co.*, 13 Allen, 400; *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157.

The word "guaranteed," as used in shares of preferred stock, will render the dividends to be paid thereon cumulative where otherwise they might not be, and their holder is entitled to a payment out of future profits before any dividend is payable on the common stock: *Stevens v. South Devon Ry. Co.*, 9 Hare, 512; *Henry v. Great Northern Ry. Co.*, 1 De Gex & J. 606; *Field v. Lamson etc. Mfg. Co.*, 162 Mass. 388; *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157. The word "guaranteed" is not always necessary, however, in order to make dividends cumulative, as is seen from the cases of *Elkins v. Camden R. R. Co.*, 36 N. J. Eq. 233, and *West Chester R. R. Co. v.*

Jackson, 77 Pa. St. 321. In the absence of a statute, the word "guaranteed" has, therefore, little, if any, significance greater than the word "preferred," and gives no added rights to the holders of that class of stock. But the legislature has power to confer upon a corporation the right to guarantee stock so that it will be what its name implies. When a statute does confer such a right, the guaranty of dividends on preferred stock becomes an absolute one, not conditional upon the earning of sufficient profits by the corporation to pay them, but which are payable out of gross earnings: *Williams v. Parker*, 136 Mass. 204; *Gordon v. Richmond etc. R. R. Co.*, 78 Va. 501. In the absence of statute, such an absolute right to dividends cannot be given by a corporation. The opinion in *Dickinson v. Railroad Co.*, 7 W. Va. 390, implies that there is a difference between preferred and guaranteed stock. In this case, the lower court had decreed that the corporation should issue stock guaranteed to pay eight per cent, when the contract of purchase called only for "eight per cent preferred stock." This decree was held to be error, and correctly so, since the corporation could not be required to do more than its contract called for. Whether there was in legal effect any difference between the two classes of stock was not involved, and not decided.

Preference over Common Stock.—The interest which holders of preferred stock acquire by reason of the preference given relates to the distribution of dividends, to which they have a right paramount to that of the holders of common stock. Ordinarily, this right to a prior dividend is the only preference which is given such stock: *State v. Cheraw etc. R. R. Co.*, 16 S. C. 524. The preference relates to dividends and not to capital, the general rule being that all classes of stock have the same right to share in the assets of the corporation, no class having a preference over another in that respect: *Jones v. Concord etc. R. R. Co.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650; *Gordon v. Richmond etc. R. R. Co.*, 78 Va. 501; *Birch v. Cropper*, 14 App. Cas. 525. Preferred stock may be given a preference as to capital either by agreement or by statute. When, by contract, preferred stock is made a lien on the assets of the corporation, we have already seen that such an agreement cannot make creditors out of the holders of such stock so as to acquire a priority over creditors of the corporation. It is only by virtue of a statute that such a result can be accomplished. Such a device is contrary to the nature of capital stock and opposed to public policy. An agreement of this character is valid, however, as between the stockholders and the corporation when not prohibited by the local law or the charter of the corporation, the effect being to give preferred stockholders a preference over common stockholders in relation both to dividends and capital: *Hamlin v. Toledo etc. R. R. Co.*, 78 Fed. Rep. 664; *Continental Trust Co. v. Toledo etc. R. R. Co.*, 86 Fed. Rep. 929. The general corporation act of New Jersey gives to preferred stock a preference over common stock in the dis-

tribution of capital: *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181. In *Miller v. Ratterman*, 47 Ohio St. 141, where a mortgage was given to secure the holders of preferred stock in the payment of dividends guaranteed, it was held that the mortgage might create a preference in favor of the holders of preferred stock in corporate capital, which preference did not ordinarily exist, even though it could not create a preference as against even subsequent unsecured creditors.

Accumulations and Arrears.—The proposition is frequently asserted that preferred dividends are cumulative as a matter of law, if nothing is specified. This is certainly true when the statute or contract provides for the payment of a dividend at a fixed rate each year, even though limited by the fact that such dividend must be earned: *Hazeltine v. Belfast etc. R. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330; *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 233; *Smith v. Cork etc. Ry. Co.*, 3 I. R. Eq. 356. Even granting the truth of this general principle, where "nothing is specified," it requires the specification of but few words to induce the courts to interpret the preferred dividends as noncumulative. In *Cotting v. New York etc. R. R. Co.*, 54 Conn. 156, the statement was made that ordinary preferred stock payable from "surplus," or "net profits," takes its chances with common stock; and if, from any cause, a dividend fails, it is gone. In *Hazeltine v. Belfast etc. R. R. Co.*, 79 Me. 411, 1 Am. St. Rep. 330, dividends on preferred stock were held not to be cumulative under a by-law which implied that the entire net earnings of each year should be paid out in dividends. *Staples v. Eastman etc. Co.*, [1896] 2 Ch. 303, is to the same effect. And again in *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 233, under a statute giving to preferred stock a dividend not exceeding seven per cent before any should be paid on the common stock, it was held that establishing the maximum dividend implied that it might be less, even to a minimum of nothing, hence the statute did not contemplate the payment of any deficiency out of the earnings of future years. That accumulations were to be allowed has, in fact, generally been construed from the terms of the contract or of the statute under which the stock was issued. In *West Chester etc. R. R. Co. v. Jackson*, 77 Pa. St. 321, the statute authorizing the issue of the preferred stock read that it should receive eight per cent per annum, payable semi-annually, "from the time of payment for the stock." This fixing the time from which dividends were to be estimated was deemed conclusive on the question of accumulations. We have already seen that to "guarantee" a certain dividend on preferred stock has the effect of making such dividends cumulative, and many of the cases relate to "guaranteed" stock: See *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Prouty v. Michigan etc. R. R. Co.*, 1 Hun, 655. See, also, *Bates v. Androscoggin etc. R. R. Co.*, 49 Me. 491. When dividends are, in fact, cumulative, the preferred stock is entitled not only to have its dividend for a par-

ticular year paid, but all arrears as well, before the common stock is entitled to any. The doctrine that preference shareholders are entitled to be first paid the amount of dividends guaranteed, and of all arrears of dividends or interest before the other shareholders are entitled to receive anything, and although they can receive no profits where none are earned, yet as soon as there are any profits to divide they are entitled to the same, is fully supported by authority: *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157. "If profits, divisible at a given time, are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good, out of the next divisible profits, the ordinary shareholder taking nothing until all arrears of guaranteed dividends have been paid to the preference shareholders": *Prouty v. Michigan etc. R. R. Co.*, 1 Hun, 655. This same case also holds that where dividends are given to the holders of common stock which should have been divided among the preferred stockholders, a preferred stockholder may recover interest on such dividends which he was entitled to receive, estimated from the time the net earnings were appropriated to the holders of the common stock by the corporation. Compound interest was allowed in *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157. Interest on arrears not paid by reason of insufficient profits is not recoverable: *Corry v. Londonderry etc. Ry. Co.*, 29 Beav. 263. The right to recover arrears of dividends is not waived by mere delay: *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157; *Smith v. Cork etc. Ry. Co.*, 3 I. R. Eq. 356.

Right to Vote.—Preferred stockholders, in the absence of any agreement or statute to the contrary, are entitled to vote the same as any other holders of stock: *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156. The privilege of voting may, however, be surrendered, and the stockholder is none the less a stockholder by reason of that fact. Such an agreement is valid between stockholders, though it may be of doubtful public policy. The privilege of voting is of some value at least, and to deprive one class of stockholders of the right to vote gives an added value to the shares of the other class and places a premium upon them: *Hamlin v. Toledo etc. R. R. Co.*, 78 Fed. Rep. 664; *Miller v. Ratterman*, 47 Ohio St. 141. It also furnishes some opportunity and temptation to the stock which is entitled to vote to use the corporation in the furtherance of its own ends to the prejudice of the holders of stock deprived of the right to vote. Preferred stockholders may also be given the sole right to vote, to the exclusion of the holders of common stock: *Mackintosh v. Flint etc. R. R. Co.*, 32 Fed. Rep. 350.

Liabilities.—As preferred stockholders in general possess the same right as ordinary stockholders, they are at the same time subject to the same liabilities. Holders of preferred stock are, therefore, subject to the statutory liability, equally with the common stockholders: *Railroad Co. v. Smith*, 48 Ohio St. 219. At least in Ohio, a preferred stockholder cannot be released from his individual liability to creditors, and an attempt to do so either does not make him

a stockholder in fact, in which case he is not subject to the statutory liability, or, if he is a real stockholder, does not render him any the less liable to creditors: *Burt v. Rattle*, 31 Ohio St. 116.

Distribution of New Stock.—An issue of new shares of stock on an increase of the capital of a corporation is a partial division of the common property. We have already seen that, as applied to the common property, the capital, the assets of the corporation, preferred stockholders have no greater right than ordinary stockholders. A preference may be given as respects capital, but, in the absence of any such stipulation, preferred stockholders, upon a distribution of the capital, share alike with common stockholders. Now, an issue of new shares is a division of a portion of the capital of the corporation. In such a division every shareholder, of whatever class, has a right to share, and to share equally, unless one class has by contract been given a preference. "When new stock is issued," as was said in *Jones v. Concord etc. R. R. Co.*, 67 N. H. 119, "each stockholder is entitled to a portion of it, not merely because the issue may affect his rights to dividends, but also because the new stock includes an undivided part of the road, of every part of which he is an owner, and because every shred of his title is as indefeasible and inviolable as the whole of it would be if he were the sole unincorporated owner of the road." So the preferred stockholder has a right to share in the distribution of new stock, whether such new stock is preferred, common, or deferred, but it is the same right possessed by every other stockholder, unless he is given a preference in the distribution of capital, for a preference in dividends carries with it no added claim upon the capital. This may result, as was pointed out in *Jones v. Concord etc. R. R. Co.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, in a grossly inequitable distribution, for the reason that preferred dividend paying shares may be of far greater value than ordinary shares, considered solely as a dividend paying investment, and a distribution of the dividend earning capital either in whole by a sale of the property, or in part by an issue of new stock, seemingly gives to the common stockholder, in effect, a preference. But the rights of preferred stockholders must be and are limited by the contract conferring such rights. And where their contract grants but equal rights in capital, such rights are not extended by the preference secured to them in dividends earned.

Rights of Assignee.—An assignee of preferred stock possesses the same rights as an assignee of any other class of stock. An assignment carries with it all right to the earnings or profits or claims to dividends: *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449. As was said in *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157, "a shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made or a dividend declared. When this is done, the dividend belongs to the owner of the share at the time, and, until the dividend is declared, it is a portion of the assets of the corporation, and an assignment of the stock carries

with it its proportionate share of such assets, which necessarily include as an incident all undeclared dividends. These are the subject of assignment, and pass with the transfer of the stock as a portion of the capital of the company." An assignee of guaranteed stock has the right to unpaid dividends that fell due before he acquired his title, without regard to the sources from which, or the time during which, the funds divided were acquired by the corporation: *Jermain v. Lake Shore etc. Ry. Co.*, 91 N. Y. 483.

Stock Bearing Interest.—As previously noted, arrangements are frequently made where interest is stipulated to be paid on stock. Such an arrangement is equitable and just. The holder of such a share of stock is a stockholder, possessing the same rights as other stockholders: *McLaughlin v. Detroit etc. Ry. Co.*, 8 Mich. 100. The provision is often inserted that such interest shall be payable only when the surplus earnings of the corporation shall enable it properly to do so: *Richardson v. Vermont etc. R. R. Co.*, 44 Vt. 613. But irrespective of such a provision, a corporation can pay interest on stock only out of profits, and interest on stock can be guaranteed only with reference to the earning capacity of the corporation. And while, ordinarily, interest and dividends are not synonymous, yet, as applied to a payment to be made on the shares of stock of a corporation, they are the same in the sense that neither can be paid out of the capital of the corporation, but are dependent on its earnings: *Pittsburgh etc. R. R. Co. v. County of Allegheny*, 63 Pa. St. 126; *Painesville etc. R. R. Co. v. King*, 17 Ohio St. 534; *Cunningham v. Vermont etc. R. R. Co.*, 12 Gray, 411. An agreement of a railroad company with a subscriber to stock, that he "shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation," was held not to bind the company to pay the subscriber any interest until the road was in operation: *Waterman v. Troy etc. R. R. Co.*, 8 Gray, 433. Where a corporation has voted to pay an interest dividend on stock when it should be able, the discretion of determining whether the corporation is able to pay the dividend seems to be left less with the directors in such a case than in an ordinary case of declaring dividends. The final decision does not rest with the directors, but with the court, which, in judging of it, will pay regard not only to the existing liabilities and funds of the corporation, but also to those contingencies to which it is exposed, which may require unusual outlays: *Barnard v. Vermont etc. R. R. Co.*, 7 Allen, 512.

"Special Stock" in Massachusetts.—By statute in Massachusetts corporations are authorized to issue what is called "special stock." It is essentially different from ordinary preferred stock, in that its holder is a creditor of the corporation both as respects dividends and the final redemption of the stock out of the capital of the corporation. This stock is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after

a fixed time, to be expressed in the certificate; the corporation is bound to pay a fixed half-yearly sum, or dividend, upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock, and the issue of this special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed: 1 Cook on Corporations, sec. 276. Most of the rights given the holders of this stock are not the rights of stockholders, and to the extent of these rights the holders are something other than stockholders of the corporation.

Remedies of Preferred Stockholders.—As a general rule, the remedy of a preferred stockholder is in equity, and not at law. The holder of guaranteed stock is not such a creditor of the corporation as to be entitled to maintain an action at law to recover payment of the stipulated dividends. To maintain an action at law to recover money implies the right to collect such money by a levy of execution upon the corporate property, and the guaranteeing of dividends is not such an engagement on the part of the corporation as entitles the guaranteed shareholder to recover a judgment for undeclared dividends, and collect it upon execution in competition with the claims of creditors. "The union of a right to receive a distributive share of the profits or net earnings with the right to enforce a payment of such a percentage as a debt would be unusual, if not incongruous": *Williston v. Michigan etc. R. R. Co.*, 13 Allen, 400; *Field v. Lamson etc. Mfg. Co.*, 162 Mass. 388; *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157. After a dividend has been declared, however, an action at law may be maintained to recover the amount set apart for the benefit of each individual stockholder: *West Chester etc. R. R. Co. v. Jackson*, 77 Pa. St. 321. This general rule controlling an action at law was violated in *Bates v. Androscoggin etc. R. R. Co.*, 49 Me. 491, the court sustaining an action at law by a preferred stockholder to recover dividends guaranteed out of net profits, although a dividend had not been declared. The court does not refer to the doctrine that the appropriate relief of a stockholder under such circumstances is in equity. And in *McLaughlin v. Detroit etc. Ry. Co.*, 8 Mich. 100, an action at law to recover interest guaranteed to preferred stockholders was sustained, such interest being deemed in the nature of a debt. These two cases are opposed to the weight of authority and are not sustained by the better reasoning, since it is rarely good public policy to grant real stockholders the rights of creditors until a specific fund has been set apart for them, and to determine whether stockholders are entitled to have a fund set apart for them is clearly a matter to be determined by a court of equity.

The appropriate remedies of preferred stockholders are to be had in a court of equity. To determine whether a dividend should be declared and to compel such declaration, as well as to determine questions of priority of one class of stock over another in the matter of dividends, are clearly matters of equitable cognizance:

Williston v. Michigan etc. R. R. Co., 13 Allen, 400; Prouty v. Michigan etc. R. R. Co., 1 Hun, 655; Smith v. Cork etc. Ry. Co., 3 I. R. Eq. 356. Ordinarily, the discretion of the directors of a corporation in refusing to declare a dividend will not be interfered with. But if it is shown that they are acting unreasonably and arbitrarily in refusing to declare a dividend, preferred stockholders can, in equity, compel them to make a dividend out of net profits: Field v. Lamson etc. Mfg. Co., 162 Mass. 388. The court will compel a corporation to declare and pay dividends on preferred stock, when the question becomes one more of right to be determined by the law than of discretion to be determined by the directors, and the directors refuse to perform their legal duty: Hazeltine v. Belfast etc. R. R. Co., 79 Me. 411, 1 Am. St. Rep. 330. The rule was well stated in Storow v. Texas etc. Mfg. Co., 87 Fed. Rep. 612: "While it is largely a matter of discretion with the board of directors as to what use they would put the profits to, whether to declare a dividend or use them in the business of the company, there is a limit to this discretion; and the courts will not allow the directors to use their powers oppressively by refusing to declare a dividend while the net profits and character of the business clearly warrant it" This case also holds that preferred stockholders have a lien on the net profits of the corporation as soon as it can be shown that there are net profits wherewith to pay a dividend, and that these funds can be followed wherever invested by the company.

Preferred stockholders may bring a suit to compel a specific performance of their agreement with the corporation: Boardman v. Lake Shore etc. Ry. Co., 84 N. Y. 157. They may also maintain a bill to restrain the corporation from paying dividends on common stock until all dividends on preferred stock, including all arrears due, shall have been paid: Boardman v. Lake Shore etc. Ry. Co., 84 N. Y. 157; Smith v. Cork etc. Ry. Co., 3 I. R. Eq. 356.

Rights on Dissolution.—As the preference given to stockholders relates to dividends and not to capital, it follows that on dissolution the assets of a corporation are distributed to all stockholders alike in proportion to the shares held: Birch v. Cropper, L. R. 14 App. Cas. 525; Gordon v. Richmond etc. R. R. Co., 78 Va. 501. Though this may result in an inequitable distribution, as pointed out in Jones v. Concord etc. R. R. Co., 67 N. H. 119, 234, 68 Am. St. Rep. 650, by reason of the greater value of the preferred shares, yet where the contract of preferred shareholders, or the statute conferring rights upon them, gives no preference with respect to capital, such shareholders are, as to capital, merely shareholders, and nothing more, and can claim no rights paramount to other holders of stock. Upon dissolution, therefore, the claims of stockholders to the assets of a corporation are equalized. There must, however, be a dissolution in order to equalize the rights of common and preferred stockholders, and a consolidation of railroads is not such a dissolution as gives to the holders of common stock the same rights as those of preferred stock: Hale v. Cheshire R. R. Co., 161 Mass. 443. Similar to

a winding up on dissolution is a reduction of capital stock by reason of losses. In such a case, preferred stock should be reduced proportionately with common stock, unless the former is preferred as to assets as well as to dividends: *In re Quebrada Ry. etc. Co.*, L. R. 40 Ch. Div. 363.

Preferred stockholders may, however, by agreement be given a preference over common stockholders in the capital of a corporation, and such preference will be given effect upon a dissolution of the corporation: *Hamlin v. Toledo etc. R. R. Co.*, 78 Fed. Rep. 664; *Toledo etc. R. R. Co. v. Continental Trust Co.*, 95 Fed. Rep. 497. Such a preference may also be given by statute: *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181. And where a mortgage is given to secure the payment of guaranteed dividends, the holders of the guaranteed stock will acquire a claim to assets of the corporation paramount to that of common stockholders, and this priority will be recognized upon dissolution: *Miller v. Ratterman*, 47 Ohio St. 141.

SUPREME COUNCIL OF THE ROYAL ARCANUM v. BRASHEARS.

[89 MARYLAND, 624.]

INSURANCE—EVIDENCE TO PROVE SUICIDE.—In an action on an insurance policy, a statement, not sworn to, signed by one as "acting coroner," that the death of the insured was a clear case of suicide, and which was sent by a local council of a benefit society of which the deceased was a member to the governing body, is not admissible in evidence either to prove the cause of death, since the statement is only an expression of the opinion of the person signing it, or as a representation made by the beneficiary.

INSURANCE—PRESUMPTION AS TO CAUSE OF DEATH. The presumption is that the death of an insured person was due to natural causes, and where death resulted from a pistol shot wound the presumption is that the wound was the result of accident, so that the burden of proof is upon the defendant to show that it was not the result of accident.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—CONFLICT OF LAWS.—A statute of Massachusetts applying to mutual benefit associations incorporated in that state, and which provides that when any certificate of insurance is issued to a resident of that state no misrepresentations made by the assured shall be deemed material or defeat the certificate, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss, is applicable to a certificate of insurance issued to a nonresident, because in a purely mutual association all members must be treated alike.

INSURANCE—WARRANTIES, WHAT ARE NOT.—Statements by an applicant for life insurance, which by the terms of the policy are made part of the contract with the insurance company, are not to be regarded as warranties, unless the policy upon its face plainly declares that they shall be treated as such.

INSURANCE — WARRANTIES — BURDEN OF PROOF.—Where a policy of insurance provides that statements made by the assured in his application as to existing facts relating to his health and habits are to be regarded as warranties, the burden of proving their truth does not rest upon the plaintiff in a suit upon the policy, but upon the defendant who alleges a breach of them.

INSURANCE—WHAT INCLUDED IN CONTRACT OF.—The contract of membership in a mutual insurance association always includes the constitution and by-laws of the association, whether they are specially referred to in the contract or not.

INSURANCE—DAMAGES.—In an action upon a benefit certificate the measure of damages is the sum stipulated in the benefit certificate, with interest at the discretion of the jury.

William P. Maulsby, A. C. Trippe, and James McC. Trippe, for the appellant.

Milton G. Urner, William H. Thomas, Clabaugh & Roberts, and Keedy & Urner, for the appellee.

⁶²⁶ **SCHMUCKER, J.** On January 29, 1896, Cornelius O. Brashears, who was a resident of Mt. Airy, in Frederick county, became a member of the Mt. Airy Council of the Royal Arcanum. On the 24th of March in the same year Brashears spent a portion of the day in Ellicott City, where he purchased a six-dram bottle of laudanum. In the afternoon of the same day he started toward his home on the Baltimore & Ohio Railroad, but left the cars at Marriottsville and walked up the public road, where he was last seen sitting upon a fallen tree reading a book.

Two days afterward his dead body was found near the place at which he was last seen alive. There was a pistol wound in the head of the body when it was found, and a pistol, the empty laudanum bottle, and another empty bottle which smelled of whisky all lay near by. At the time of his death he was in good standing in the Mt. Airy Council, and all of his dues to it were paid.

The Royal Arcanum is a well-known mutual benevolent association. It is composed of a supreme council, incorporated by the state of Massachusetts, which is the governing body of the society, and numerous subordinate councils, which are unincorporated local organizations. A person joining the Arcanum becomes a member of one of the local councils, but not of the supreme council, which has no intercourse or dealings with him otherwise than through the local council of which he is a member. One of the most important features of the association is a scheme, in the nature of life insurance, for the payment, at the

death of each member, of a specified sum of money to a beneficiary designated by him. The terms and conditions upon ⁶²⁷ which this payment is to be made and the person who is entitled to receive it, are set forth in a benefit certificate which is furnished to the member.

When an individual joins the Arcanum his benefit certificate is issued by the supreme council, and is sent by it, not to him, but to the local council of which he is a member, and the latter delivers it to him. When a member dies, the by-laws do not require the beneficiary to furnish notice and proofs of death as in cases of ordinary life insurance, but they distinctly impose upon the local council to which he belonged the obligation to appoint a committee to ascertain the cause and circumstances of the death, and to send formal notice and proof of the death to the supreme council, upon blank forms supplied by that body. The supreme council then passes upon the proofs, with the right to demand further proofs from the local council, and when the proofs are approved by the officials of the supreme council, it transmits to the local council a check to the order of the beneficiary for the sum due, and the local council pays the check to the beneficiary and procures the return of the outstanding benefit certificate.

In the present case, after the death of Brashears, formal proofs and notice of his death and the circumstances of it were furnished, within the required time, by the Mt. Airy Council, which was the local council of which he was a member, to the supreme council, and it returned them to the local council for a further report, which was sent as requested, and was duly acknowledged without objection by the secretary of the supreme council. The report of the committee of investigation appointed by the local council which formed part of the proofs of death forwarded to the supreme council, stated the cause of death to be suicide, and along with the report, on a separate piece of paper, was a statement in the nature of a certificate, as follows:

"Ellicott City, Md. Mar. 30, '96.

"In regards to the case of Mr. C. O. Brashears, I viewed his body and had full controll of it and found it a clear case of suicide, and, therefore, ⁶²⁸ did not deemed a jury nec—ry.

"BERNARD WALLENHORST,
"Acting Coroner."

When Brashears desired to become a member of the Mt. Airy Council, he, in accordance with the rules of the order, filed an

application which contained a variety of statements as to his habits and condition, among which was the statement that he was temperate in his habits. The application contained a provision warranting the truth of its statements and agreeing that if any of them were untrue or fraudulent, or if there were any concealment of facts therein or to or from the medical examiner, the rights of the beneficiary should be forfeited.

When this application from Brashears was received by the local or Mt. Airy Council it directed him to present himself to the medical examiner and he did so, and, in reply to the questions propounded to him by that official, said that he did not use alcoholic or other stimulants, that he was then a total abstainer, although until four years prior thereto he drank occasionally. These answers were in writing and had appended to them a warranty of their truthfulness, which was signed by Brashears.

The certificate of membership which was issued to him contained a provision that it was issued "upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner be made part of this contract." The certificate did not refer to the statements as warranties nor make any reference to the warranty of their truth by Brashears. It further provided for the payment of three thousand dollars to the appellee, who is the widow of Brashears, "upon satisfactory evidence of the death of said member," but made no reference to the cause or method of his death, and did not mention suicide at all.

At the trial of the case in the circuit court, the appellant, as defendant, took four exceptions to the rulings of the court during the progress of the case, apart from the exception ⁶²⁹ to the rejection of its prayers submitted after the testimony was all in.

The first exception was to the refusal of the court to require the plaintiff to read to the jury, as part of the official notice of death, the paper attached to the notice, dated March 30, 1896, signed by Wallenhorst. The same question, in a slightly different form, was raised by the fourth exception which was taken to the court's refusal to permit the defendant to read that paper to the jury as evidence on its behalf.

We think the court below was correct in both of these rulings. The paper in question is, at best, an ex parte expression of the opinion of Wallenhorst. It is not a certificate of the findings of a coroner's jury or of the result of an inquest. The party signing it does not profess to be an official coroner, nor does it

appear upon what ground or by what authority he claims to be "what he designates as "acting coroner." It is not strictly part of the proof or notice of death, and was not called for by the policy or certificate of membership, or by the blank forms of proof supplied by the supreme council, nor do the by-laws of the association require its production. It was in fact furnished by the Mt. Airy Council and not by the appellee, who, under the system of proofs of death adopted by the supreme council, was not required to furnish proof of death. It cannot be regarded as a representation made by her, nor was it binding upon her: *Anderson v. Supreme Council*, 135 N. Y. 107; *Beach on Insurance*, secs. 1216, 1217.

It is equally clear that this paper was not a proper one to be read to the jury, on the offer of the appellant, as evidence to prove that the death occurred by suicide, for, although the formal proofs of death were properly admitted to show that the requirements of the certificate of membership had been complied with in that respect, they were not evidence for any other purpose and their sufficiency was a question for the court to decide: *Mutual Life Ins. Co. v. Stibbe*, 46 Md. 312; *Fidelity Mut. Life Assn. v. 630 Ficklin*, 74 Md. 183; *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470. The paper was at best a mere expression of the opinion of Wallenhorst as to the cause of Brashears' death. It was not even verified by affidavit, and it lacked every essential feature of evidence. To permit mere *ex parte* statements or even affidavits which accompany proofs of death to be read to the jury would be a most dangerous practice, for they might be taken by them as being proof and undue weight attached to them: *Cook v. Standard etc. Ins. Co.*, 84 Mich. 12.

The presumption of law is that the death of the insured was due to natural causes, and the fact that it resulted from a pistol-shot wound does not change the presumption which in that case is that the wound was the result of accident; and the burden of proof is upon the defendant to show by a preponderance of testimony that it was not the result of accident: *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470; *Bliss on Life Insurance*, sec. 337; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 54, 7 Am. Rep. 410; *Guardian Life Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Home Ben. Assn. v. Sargent*, 142 U. S. 691. Wallenhorst testified in the case, and the jury had the benefit of his evidence as to the condition of the body and its surroundings when he saw it. It would have been clearly

improper to have permitted this unsworn paper signed by him to have also gone to the jury as evidence.

The second exception was to the admission in evidence, on the offer of the appellee, of a duly certified copy of chapter 281 of the acts of 1895 of the state of Massachusetts, relating to misrepresentations in application for membership in fraternal beneficiary corporations, which is as follows:

Section 1. When any certificate is issued to a resident of the commonwealth by any fraternal beneficiary corporation organized under the laws of or admitted to do business in this commonwealth, no oral or written misrepresentations or warranty made by the assured or in his behalf in the application for such certificate, or in the negotiation of the compact, ⁶³¹ shall be deemed material, or defeat or avoid the certificate or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss.

The benefit certificate upon which the present suit is founded was executed in Boston by a Massachusetts corporation and therefore the statute in question was applicable to it and was clearly admissible in evidence under the rulings in the case of the Fidelity Mut. Life Assn. v. Ficklin, 74 Md. 180.

It is true that this act applies in terms only to cases when certificates of membership in benevolent associations are issued to residents of Massachusetts, but the mutuality and fraternity which form the basis of mutual benevolent associations and kindred organizations require that all of their members shall be treated alike.

It would be fatal to the whole benefit scheme of the Royal Arcanum if, when the case of the beneficiary of a Massachusetts member of the organization were on trial, his or her rights should be measured by a more favorable standard than would be applied to the beneficiary of a Maryland member. The regulations contained in the constitution and by-laws of the society contemplate like treatment of all of its members of the same class, without special favor or advantage to any, under a similar state of facts. In Ficklin's case, which was a suit by a Maryland member, in a Maryland court, against an insurance company incorporated in Pennsylvania, this court held that the policy was subject to and governed by a Pennsylvania statute, which was almost identical in its provisions with the Massachusetts statute now under consideration. The Pennsylvania stat-

ute did not in terms apply only to policies issued to residents of that state, but, as we have already said, in a purely mutual association, like the Royal Arcanum, all members must be treated alike, for it would be destructive of the mutuality itself of the association if, in suits against it, the benefit certificate issued to a citizen of one state should be entitled to a more favorable construction ⁶³² than a similar certificate issued to the citizen of another state.

The third exception was taken to the refusal by the court to grant the prayers taking the case away from the jury, which were offered by the defendant at the close of the plaintiff's case. There were four of these prayers, and the substance of them was that the statements made by Brashears in his application and medical examination were warranties and constituted part of the contract with the defendant, and that the burden of proof of the truth of the statements was upon the plaintiff, and that she had offered no evidence legally sufficient to prove their truth and that the defendant had not been furnished with proper proofs of death. These prayers were properly rejected.

The weight of authority seems to be that, ordinarily, the statements made by an applicant for life insurance, which by the terms of the policy are made part of the contract with the insurance company, are not to be regarded as warranties which cast upon the plaintiff the onus of proving their literal truth, but are to be regarded as representations the materiality as well as the truth of which is to be passed on by the jury: *Mutual Ben. Life Ins. Co. v. Wise*, 34 Md. 597; *Anderson v. Fitzgerald*, 4 H. L. Cas. 503-514; *Campbell v. New England etc. Ins. Co.*, 98 Mass. 381. Of course, if the policy of insurance upon its face plainly declares that the statements made by the applicant shall be treated as warranties, then, in the absence of any controlling statutory rule of construction, they would be so treated. If, however, the language of the policy is such as to leave any room for construction, the statements of the applicant will be treated as representations rather than warranties. In the case of *National Bank v. Insurance Co.*, 95 U. S. 678, the court say: "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean ⁶³³ against that construction which imposes upon the assured the obligation of a warranty." In *Moulor v. American Life Ins. Co.*, 111 U. S. 335, the court quote

the preceding extract from the case in *National Bank v. Insurance Co.*, 95 U. S. 678, and say: "These rules of interpretation, equally applicable to life insurance, forbid the conclusion that the answers to the questions in the application constituted warranties to be literally and exactly fulfilled, as distinguished from representations which must be substantially performed in all matters material to the risk." In the present case, as we have already said, the benefit certificate refers to the statements of the applicant simply as "statements," not as warranties, and uses language allowing full room for construction as to the light in which they were in fact intended to be considered.

Even if the representations of Brashears in this case are to be regarded as warranties, there is abundant authority for holding the rule now to be that the burden of proof of their truth is not upon the plaintiff in a suit upon the policy: *Piedmont etc. Life Ins. Co. v. Ewing*, 92 U. S. 377; *Campbell v. New England etc. Life Ins. Co.*, 98 Mass. 394; *Joyce on Insurance*, sec. 3790. *Beach on Insurance*, section 1315, states the law now to be that as to promissory warranties, by which the assured promises to do certain acts, such as to pay premiums, furnish proofs of death, and the like, the party suing on the policy must aver and prove them, but as to alleged warranties in the statement of existing facts when the policy was issued, as to health, habits, etc., of the assured, the defendant must aver and prove them: See, also, *Swick v. Home Life Ins. Co.*, 2 Dill. 160; *Van Valkenburgh v. American etc. Ins. Co.*, 70 N. Y. 605.

The proofs of death which were furnished by the Mt. Airy Council to the supreme council in the present case were in the usual form, upon blanks furnished by the supreme council and in conformity with its regulations and were sufficient.

After the close of the testimony the appellee, as plaintiff, offered two prayers, which were granted, and the appellant 634 offered sixteen prayers in addition to the four prayers offered by it at the close of the plaintiff's case. The court granted the appellant's eighth prayer and the ninth as modified, and rejected the others. The eighth prayer asserted that if the jury believed from all the evidence that Brashears committed suicide, as there was no evidence that he was insane at the time of so doing, the verdict must be for the defendant. The ninth prayer, as modified, asserted the proposition that, if the jury found that the statements made by Brashears in reference to his use of alcoholic or other stimulants were untrue and made with the intent to deceive the defendant, then the verdict must be for the defendant.

The fifth exception was doubtless intended by the appellant to relate to and bring here for review the court's action on the rejected prayers, but it fails to do so. The exception was prepared in skeleton form, leaving blank the spaces in which it was intended to designate the prayers which were rejected. Doubtless through inadvertence, the appellant had the exception certified without filling up the blanks, and it appears in that form in the record, and all of the prayers follow it in the record but do not appear in or form part of the exception. Under these circumstances, the action of the court upon the prayers is, strictly speaking, not before us for review: *Albert v. State*, 66 Md. 334, 59 Am. Rep. 159; *Hartsock v. Mort*, 76 Md. 290; *Central Ry. Co. v. Coleman*, 80 Md. 335. Inasmuch, however, as the rejected prayers of the appellant present but two substantial propositions not already noticed by us, we briefly consider them.

The prayers marked 5 $\frac{3}{4}$ and 9 each assert that the contract between Brashears and the appellant was made up of the benefit certificate, the application, and the medical examination taken together. This was plainly wrong, because it is well settled that the contract of membership in a mutual association is always made with reference to and includes the constitution and by-laws of the association, whether they are specially referred to in the contract or not: 3 Am. 635 & Eng. Ency. of Law, 2d ed., 1081; *Yoe v. Benjamin C. Howard etc. Assn.*, 63 Md. 86; *Fuller v. Baltimore etc. Assn.*, 67 Md. 433. In the present case they are made part of the contract by the terms of the certificate itself. It is the by-laws of the association which make it incumbent upon the local council to give notice and furnish proofs of death to the supreme council, as was done in this case.

The defendant's fifth prayer requested the court to charge the jury that if they found that Brashears had indulged in alcoholic or other stimulants within six months prior to January 21, 1896, then his representations as to his use of alcoholic or other stimulants in his application were false, and the verdict must be for the defendant. This prayer was properly rejected, first, because the statement of Brashears that he was a total abstainer was made in response to a question in the present tense, viz.: Do you use alcoholic or other stimulants, and if so, to what extent? He did not state that he had been a total abstainer for four years. The appellant drew that inference from Brashears' reply to another question by the medical examiner, as to his habit of taking liquor through his life. To that question he answered that until four years ago he drank occasionally. In the second

place, there is no clear or sufficient evidence in the record that Brashears had indulged in alcoholic or other stimulants within six months prior to January 21, 1896. Not a single witness testified to having seen him drink intoxicating liquor within that time. A number of witnesses said that he was temperate in his habits, and one witness said that when Brashears went to the bar with friends, who called for whisky, he refused whisky and drank lemonade, ginger ale, and other soft drinks. There was evidence that several times he drank cider within the period under discussion, and one witness thought that he had been a little under the influence of liquor in September, 1895, because his face was somewhat flushed, but he was rational, and the witness detected no odor about him, and it was made apparent by the cross-examination of this witness ⁶³⁶ that he spoke from impressions only, and had no actual knowledge of Brashears having taken liquor or having been under its influence during the period mentioned in the prayer. This evidence was too vague and indefinite to justify the granting of the prayer.

One of the plaintiff's two prayers fixed the measure of damages at the sum stipulated in the benefit certificate, with interest at the discretion of the jury, and the other asserted that the burden of proof that Brashears came to his death by suicide was upon the defendant. Both of these propositions were good law, and the prayers were properly granted.

The judgment appealed from will be affirmed with costs.

INSURANCE, LIFE.—A CORONER'S VERDICT IS ADMISSIBLE IN EVIDENCE to show that deceased committed suicide: Note to Ullman v. Lion, 83 Am. Dec. 787.

INSURANCE, LIFE—PRESUMPTION AGAINST SUICIDE AND MURDER.—In an action upon a policy of life insurance, where the violent death of the insured is proved, but there is no direct evidence of the manner of his death, the legal presumption is, that he did not commit suicide and was not murdered: Insurance Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685. When death may have resulted from suicide, accident, or mistake, suicide should not be presumed, but rather accident or mistake; and if the defense of suicide is set up in an action on a policy of life insurance, the burden of proving it is upon the defendant: Hale v. Life Indemnity etc. Co., 61 Minn. 516, 52 Am. St. Rep. 616.

CORPORATIONS—CONFLICT OF LAWS.—When one becomes a member of a foreign corporation, he subjects himself to such laws of the government of its situs as affect the powers and obligations of the corporation. An assessment made by a Minnesota mutual insurance company in conformity with the laws of that state may be enforced in the courts of Michigan against a member of such corporation residing therein, though such assessment would be invalid if the contract of the policy-holder were made in the latter state: Warner v. Delbridge etc. Co., 110 Mich. 590, 64 Am. St.

Rep. 367. But see *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, and note thereto; *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717; note to *Ford v. Buckeye etc. Ins. Co.*, 99 Am. Dec. 671.

INSURANCE—WARRANTIES ARE NEVER CREATED BY CONSTRUCTION.—They must appear on the face of the policy, either in express terms or as a necessary result of the conditions of the contract: *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 22 Am. Dec. 567.

INSURANCE—WARRANTIES.—THE BURDEN OF PROOF IS ON THE INSURER to prove the falsity of a representation or warranty set up as a defense to an action on a policy of life insurance: *Chambers v. Northwestern etc. Ins. Co.*, 64 Minn. 495, 58 Am. St. Rep. 549; *O'Connell v. Supreme Conclave etc.*, 102 Ga. 143, 66 Am. St. Rep. 159; but a contrary doctrine is laid down in *Sweeney v. Metropolitan Life Ins. Co.*, 19 R. I. 171, 61 Am. St. Rep. 751.

A CONTRACT OF LIFE INSURANCE by a mutual insurance association includes the constitution and by-laws of such association, whether mentioned or not: *Condon v. Mutual Reserve Assn.*, 80 Md. 99, ante, p. 169.

INSURANCE, LIFE.—THE MEASURE OF DAMAGES in assumpsit against an employé's relief association is the sum stipulated to be paid under the charter and by-laws, and not such an amount as the jury may consider just: *Baltimore etc. Assn. v. Post*, 122 Pa. St. 579, 9 Am. St. Rep. 147. Judgment for the amount of the policy, with interest thereon from the time when the policy should have been paid, is proper where a foreign life insurance company refuses to obey an order of court and pay a loss which occurred six years before: *Newman v. Covenant etc. Assn.*, 76 Iowa, 56, 14 Am. St. Rep. 196.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

HALL v. FIRST NATIONAL BANK.

[173 MASSACHUSETTS, 16.]

PROMISSORY NOTES—AGREEMENT TO RENEW.—An oral agreement that the payee of notes would renew them until such time as an improvement in the business situation would enable the maker to proceed in business without assistance directly contradicts the promise appearing on the face of the notes, and cannot be proved in an action of law.

PROMISSORY NOTES—RELIEF AGAINST IN EQUITY ON ACCOUNT OF AN AGREEMENT TO RENEW.—An oral agreement alleged to have been made prior to the execution of promissory notes to renew them from time to time until the improvement in the business situation would enable the maker to provide for their payment cannot be enforced in equity, nor can it justify the granting of an injunction against an action at law to enforce such notes according to their tenor.

Suit in equity to prevent the enforcement of certain promissory notes executed by the complainant, Hall, to the defendant bank and indorsed by the complainant Scanlan. The bill alleged certain transactions whereby the business of Hall was almost ruined, and that, to prevent the completion of such ruin, he executed these notes to raise money and re-establish himself in business, upon the agreement of the defendant that it would renew such notes and keep Hall in funds for the purposes of his business until such time as improvement in the business situation would enable him to proceed in his business without assistance, that the defendant refused to renew the notes remaining in his hands, and brought suit thereon, attaching certain property, and that the indorsement of the complainant Scanlan was made with the understanding that the notes were

to be renewed according to the agreement. The bill prayed for an injunction against the enforcement of the notes and for other relief. A demurrer to the bill was sustained, and the complainants appealed.

J. F. Simmons, for the plaintiffs.

H. L. Whittlesey, for the defendant.

¹⁸ HOLMES, J. The understanding alleged in the bill, that the bank would renew the plaintiffs' notes until such time as the improvement in the business situation should enable the plaintiffs to proceed in business without such assistance, is an understanding which directly contradicts the promise expressed on the face of the notes. For whereas the promise expressed in the notes is a promise to pay money at the maturity of the instrument, the contemporary understanding cuts it down to a promise to give a new promise to pay. It is not denied, and, on the contrary, rather is implied in the bill, that the agreement to renew was not in writing: *Adams v. Wordley*, 1 Mees. & W. 374; *Young v. Austen*, L. R. 4 Com. P. 553. If so, it could not be ¹⁹ proved in contradiction of any written contract, and especially not in contradiction of a bill or note in an action at law: *Spring v. Lovett*, 11 Pick. 417, 420; *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Hoare v. Graham*, 3 Camp. 57; *Young v. Austen*, L. R. 4 Com. P. 553; *Abrey v. Crux*, L. R. 5 Com. P. 37, 44; *Hill v. Gaw*, 4 Pa. St. 493; *Heist v. Hart*, 73 Pa. St. 286, 289.

In *Flight v. Gray*, 3 Com. B., N. S., 320, there is an intimation that relief might be given in equity upon such a promise, and some American cases treat the repudiation of an oral understanding, even though entered into with no intent not to perform it, as itself a sufficient fraud: *Rearich v. Swinehart*, 11 Pa. St. 233, 238, 240, 51 Am. Dec. 540; *Taylor v. Gilman*, 25 Vt. 411; *Murray v. Dake*, 46 Cal. 644. But this last notion has been denied by this court in cases depending upon somewhat similar principles: *Bourke v. Callanan*, 160 Mass. 195, 197. In *Flight v. Gray*, 3 Com. B., N. S., 320, Willes, J., seems to have doubted, and, where there is no fraud other than that of relying upon the principles of law, we see no satisfactory ground for allowing the engagement in a note to be varied in this way in equity any more than at law, at least on behalf of a plaintiff seeking specific performance of the oral agreement: *Dwight v. Pomeroy*, 17 Mass. 303, 9 Am. Dec. 148; *Woollam v. Hearn*, 7 Ves. 211, 219; *White & Tudor's Leading Cases in Equity*, 6th ed., 508, 513, and see

note, 525; *Omerod v. Hardman*, 5 Ves. 722, 730, 731; *Pomeroy's Equity Jurisprudence*, sec. 854, note; see *Goode v. Riley*, 153 Mass. 585, 587; *Quinn v. Roath*, 37 Conn. 16, 30.

Again, it is highly improbable that such an agreement as is alleged can mean to leave the determination of the time when money may be demanded to anyone but the holder of the notes: See *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422. On the face of it, it does not import a legally binding promise, but rather a hopeful encouragement sounding only in prophecy. We cannot discover an actionable contract. Still less one that can be specifically enforced. Every allegation in the bill is too vague and uncertain.

Bill dismissed.

PROMISSORY NOTES—PAROL AGREEMENT TO RENEW.—Parol evidence of an agreement to extend the time of payment of a promissory note, made after the execution of the note, is admissible; and such oral agreement is binding so that a suit cannot be brought until the expiration of that time: *Ferguson v. Hill*, 3 Stew. 485, 21 Am. Dec. 641.

EASTER v. FOSTER.

[173 MASSACHUSETTS, 39.]

REPLEVIN BOND—ACTION UPON—TITLE TO PROPERTY.—If the plaintiff in an action of replevin, after giving bond and obtaining possession of the property, fails to enter his writ, he is not estopped in an action upon such bond from proving that he was the owner of the property and that the defendant in the replevin suit never had any interest therein.

Action of contract against the principal and sureties on a replevin bond. Verdict and judgment in favor of the plaintiff for one dollar only. The plaintiff alleged exceptions.

A. S. Apsey, for the plaintiff.

M. F. Farrell, for the defendants.

³⁹ **KNOWLTON, J.** The defendant Foster replevied a horse from the plaintiff, and he, with the other defendants as sureties, gave a replevin bond in the usual form. He failed to enter his writ, and the plaintiff brings this action on the bond to recover for the breach of it. The jury were instructed that the plaintiff was entitled to judgment for the penal sum of the bond, and

were directed to determine how much was payable in equity and good conscience for this breach of the condition, in order that the court might award to the plaintiff a proper execution: Pub. Stats., c. 171, sec. 10. Upon this part of the case the defendants were allowed to introduce evidence that the plaintiff never had any title to the horse, and that it belonged to the defendant Foster. The plaintiff's exception to the admission of this evidence raises the only question before us.

On a hearing to determine for how much execution shall issue for a breach of the condition of a replevin bond, it is established that any pertinent facts may be shown in diminution of the claim, unless the defendants are estopped to prove them ⁴⁰ by an adjudication in the previous suit. If the title to the horse had been put in issue, and determined in favor of the defendant in the replevin suit, the judgment would have been conclusive against the defendants in the suit upon the bond. But if a return had been ordered on a nonsuit of the plaintiff, the question of title would have been left open, as it is left open in the present suit, which is founded, not upon a failure to comply with an order for a return of the property, but upon a failure to enter the replevin writ.

The rules applicable to such cases were long ago stated by this court, and it is unnecessary to consider them further: *Leonard v. Whitney*, 109 Mass. 265; *Davis v. Harding*, 3 Allen, 302; *Bartlett v. Kidder*, 14 Gray, 449.

Exceptions overruled.

REPLEVIN BOND—ACTION UPON.—A plaintiff discontinued a replevin suit, and the defendant took judgment for a return of the property and issued an execution, which was returned unsatisfied. In a suit on the replevin bond for failure to return it, it was held that the defendants were entitled to show that the principal defendant (plaintiff in the replevin suit) was the owner of the property at the time it was replevied and was still the owner: *Pearl v. Garlock*, 61 Mich. 419, 1 Am. St. Rep. 603.

JEWETT v. WEST SOMERVILLE CO-OPERATIVE BANK.

[178 MASSACHUSETTS, 54.]

CO-OPERATIVE BANKS—AUTHORITY OF TREASURERS OF.—The treasurer of a co-operative or a savings bank has no implied authority to bind the corporation by the acceptance of an order drawn on it for the payment of money.

Action of contract against the defendant, a co-operative bank, organized under the laws of Massachusetts, on an acceptance signed by its treasurer of an order drawn by Margaret McGovern requesting the defendant to pay plaintiff two hundred and fifty dollars out of a second payment of money due her on a mortgage. The evidence showed that no vote of the directors had ever been given authorizing the officer to accept the order, and that it had not been the custom for it to make any similar acceptances. The defendant asked the court to rule that it had no power to make itself liable as an acceptor, and that its treasurer had no authority to accept an order in its behalf. The court refused to so rule, and gave judgment in favor of the plaintiff. The defendant alleged exceptions.

J. H. Barnes, Jr., for the plaintiff.

D. C. Delano, for the defendant.

⁵⁶ **KNOWLTON, J.** This action is brought on an acceptance of an order for the payment of money drawn on the defendant corporation and accepted by its treasurer. To maintain his action the plaintiff must establish the validity of the acceptance. The defendant is a co-operative bank, established and doing business under the laws of the commonwealth: See Pub. Stats., c. 117; Stats. 1882, c. 251; Stats. 1883, c. 98; Stats. 1885, c. 121; Stats. 1887, c. 216; Stats. 1889, c. 159; Stats. 1890, c. 78; Stats. 1894, c. 342; Stats. 1895, c. 171; Stats. 1896, cc. 277, 285, 361; Stats. 1897, c. 161; Stats. 1898, c. 247. Such banks are subject to the supervision of the savings bank commissioners, and in their organization and general features are closely allied to savings banks: *Atwood v. Dumas*, 149 Mass. 167, 169. They are not authorized to do a general banking business, and their rights and powers are strictly limited for the protection and benefit of their members.

The defendant contends that, under the statutes of this commonwealth, it could not, even under an express vote, accept such ⁵⁷ an order as the plaintiff has declared on. We do not find it

necessary to determine the question thus presented. If we assume in favor of the plaintiff that the making and acceptance of this order were so connected with the payment of the money which the mortgagor was to receive as a loan that the corporation might have bound itself by an acceptance, we come to the question whether the treasurer could bind the corporation by such an undertaking without express authority so to do.

The statute provides: "All payments made by the corporation for any purpose whatsoever shall be by order, check, or draft upon the treasurer, signed by the president and secretary," etc., and that the "treasurer shall dispose of and secure the safekeeping of all moneys, securities, and property of the corporation in the manner designated by the by-laws," etc.: Pub. Stats., c. 117, sec. 17. We find nothing in the nature of the business to be done by such corporations, or in the express provisions of the statutes, which indicates that their treasurers can create liabilities on the part of such corporations by their signatures to commercial paper, or by their indorsement or acceptance of such paper. There is no reason why the power of the treasurer of a co-operative bank should be greater than that of a treasurer of a savings bank. A treasurer of a savings bank cannot bind the corporation by such indorsements, nor by any similar transaction: *Bradlee v. Warren Five Cents Sav. Bank*, 127 Mass. 107, 34 Am. Rep. 351; *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16, 20, 43 Am. Rep. 495; *Holden v. Upton*, 134 Mass. 177; *Holden v. Phelps*, 135 Mass. 61. Treasurers of other similar corporations, as well as of parishes and municipalities, are also of limited authority: *Craft v. South Boston R. R. Co.*, 150 Mass. 207; *Webber v. Williams College*, 23 Pick. 302; *Packard v. First Universalist Soc.*, 10 Met. 427; *Torrey v. Dustin Monument Assn.*, 5 Allen, 327; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 109. There is a material difference between the implied powers of treasurers of manufacturing and trading corporations, and those of treasurers of corporations organized for special purposes, which ordinarily do not have occasion to use commercial paper in the transaction of their business. It is plain that the defendant's treasurer had no implied authority by virtue of his office to bind it by his acceptance of the plaintiff's order.

58 The defendant's by-laws, which were put in evidence, and the oral testimony, tended strongly to show that the treasurer had no actual authority to sign an acceptance of this kind for the bank, and they furnished no evidence to sustain the plaintiff's contention in this particular. We are of opinion that the ruling

requested by the defendant, that "the treasurer of the defendant corporation had no authority to accept the order declared on in the name and behalf of the defendant, and make the defendant liable on said order to the plaintiff, and that on all the evidence the plaintiff is not entitled to recover," should have been given.

Exceptions sustained.

SAVINGS BANKS—AUTHORITY OF TREASURER OF.—The treasurer of a savings bank cannot bind it by an indorsement in its name, by virtue of his office, although it had directed the sale of its notes, and authorized him to "draw all necessary papers and discharge all obligations": *Bradlee v. Warren Sav. Bank*, 127 Mass. 107, 34 Am. Rep. 351. See, also, *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16, 43 Am. Rep. 495.

WINEBURGH v. UNITED STATES STEAM AND STREET RAILWAY ADVERTISING COMPANY.

[173 MASSACHUSETTS, 60.]

FOREIGN CORPORATIONS.—EQUITY WILL TAKE JURISDICTION of a suit brought by a stockholder against a foreign corporation and the executor of a former president, to compel the estate of such president to make good to the corporation the amount of alleged misappropriations of corporate property by him while in office.

CORPORATIONS—LIABILITY OF PRESIDENT—PARTIES.—Where a president has misappropriated corporate funds to a partnership of which he is a member, the other partners are not necessary parties to an action brought by a stockholder against the executor of the president's estate to compel the estate to make good the amount of the misappropriation.

CORPORATIONS—LIABILITY OF OFFICER—SURVIVAL OF ACTION.—The liability of an officer of a corporation for misappropriation of corporate property by him while in office survives his death.

L. M. Friedman, for the plaintiff.

G. F. Ordway, for the defendants.

HOLMES, J. This is a bill by a stockholder in the defendant corporation, seeking that the estate of one Carleton, a former president of the corporation, may be required to make good to it his amount of alleged frauds and misappropriations of corporate property by him while in office. The defendants demur upon various grounds, with which we proceed to deal.

It appears by the bill that the alleged misappropriations by Carleton were made to a firm composed of himself and one Kis-

sam. It is objected that Kissam ought to be joined, and that it does not appear that assets of the corporation came to the hands of the defendant executrix. But the bill is brought for indemnity, not for restitution, and so both of these objections fall to the ground: See *Charitable Corp. v. Sutton*, 2 Atk. 400; 9 Mod. 349; *Concha v. Murrieta*, L. R. 40 Ch. Div. 543.

It is suggested also that the liability of Carleton did not survive. We do not perceive why it should not. It arose from a breach of a fiduciary relation by which he enriched himself: *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 104; *Cutter v. Hamlen*, 147 Mass. 471; *Stebbins v. Palmer*, 1 Pick. 71, 78, 79, 11 Am. Dec. 146; *Concha v. Murrieta*, L. R. 40 Ch. Div. 543, 553. Last of the minor objections, it is urged that the bill discloses laches; but there are no dates definite enough to show what may be the fact in this regard.

Perhaps the ground most relied on is that the defendant corporation is a foreign corporation,* and that therefore this court will not take jurisdiction. There is no question that ⁶² it can take jurisdiction if it sees fit, as the corporation has been served with process, and has appeared. We do not find in the case, and we have not heard in argument, any suggestion of authority or reason for not using our power. The relief which is sought probably must be sought here if anywhere, as here was the domicile of the alleged wrongdoer, and here is the principal administration of his estate. If the corporation was the plaintiff, probably no one would raise a question. The representative of the wrongdoer, acting against the interest of the corporation, declines to let it sue as plaintiff, and compels the minority stockholders to make it a defendant, but still only that it may receive its dues and reparation for its wrongs. The corporation is no longer a going concern, and really is a bare trustee for its members. We can see no more reason for refusing to entertain the suit upon the allegations of the bill than if it were brought by the corporation itself, or than if the plaintiff were at liberty to proceed without making the corporation a party, directly, on his own behalf: *Ervin v. Oregon Ry. & Nav. Co.*, 20 Fed. Rep. 577; or than for refusing to appoint an ancillary receiver: *Graham v. Mutual Aid Soc.*, 161 Mass. 357. See, also, *Gray v. Fuller*, 17 App. Div. 29; *Redmond v. Hoge*, 2 Hun, 171; *Murray v. Vanderbilt*, 39 Barb. 140, 147.

The bill alleges that the plaintiff has requested the corporation to sue Carleton's estate, but that Carleton owned most of the stock, and, owing to the corporation being so completely un-

der the control of Carleton's representatives, it is unable and unwilling to do so. These allegations are enough to warrant the interposition of the court: *Brewer v. Boston Theatre*, 104 Mass. 378; *Dunphy v. Traveller Newspaper Assn.*, 146 Mass. 495, 498.

Finally, it is suggested that it would be of no advantage to the plaintiff if the relief asked were granted. We do not understand the ground of this argument, unless it be a threat that the defendant executrix will repeat the fraud. It is true that we must leave it to the plaintiff to protect himself against that.

Demurrer overruled.

FOREIGN CORPORATIONS—JURISDICTION.—Whether or not a corporation can be sued in a state of which it is not a resident depends upon the position in which it has placed itself in reference to that state in connection with the laws thereof: *Reyer v. Odd Fellows' etc. Assn.*, 157 Mass. 367, 34 Am. St. Rep. 288. By doing business in a foreign state a corporation subjects itself to the laws of that state: *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418. But the courts of a state have no jurisdiction to inquire into or regulate the internal affairs of a foreign corporation doing business therein: *Condon v. Mutual Reserve Assn.*, 89 Md. 99, ante. p. 169.

CORPORATIONS.—EQUITY WILL TAKE JURISDICTION of a suit brought by a corporation against its president or treasurer for misconduct in the discharge of their respective duties: *North Hudson etc. Assn. v. Childs*, 82 Wis. 460, 33 Am. St. Rep. 57; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

ABATEMENT.—A SUIT IN EQUITY FOR FRAUD does not die with the person of the defendant, but may be revived against his representatives: *Note to Hubbell v. Blandy*, 24 Am. St. Rep. 160.

AMERICAN WALTHAM WATCH COMPANY v. UNITED STATES WATCH COMPANY.

[173 MASSACHUSETTS, 85.]

TRADE NAMES—GEOGRAPHICAL NAME—INJUNCTION. While a man cannot appropriate a geographical name, yet, if such a name becomes so associated with the goods of a manufacturer that its use by another, unqualified and unexplained, would mislead the customers of the first and tend to defraud the public, the second manufacturer will not be allowed to use such name without distinguishing his wares, and an injunction restraining him from using the general geographical name will be issued.

W. A. Munroe and F. P. Fish, for the plaintiff.

C. Browne and O. R. Mitchell, for the defendant.

85 **HOLMES, J.** This is a bill brought to enjoin the defendant from advertising its watches as the "Waltham Watch" or

"Waltham Watches," and from marking its watches in such a way that the word "Waltham" is conspicuous. The plaintiff was the first manufacturer of watches in Waltham, and had acquired a great reputation before the defendant began to do business. It was found at the hearing that the word "Waltham," which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's ⁸⁶ watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name. This is recognized by the defendant so far that it agrees that the preliminary injunction, granted in 1890, against using the combined words "Waltham Watch" or "Waltham Watches" in advertising its watches, shall stand and shall be embodied in the final decree.

The question raised at the hearing, and now before us, is whether the defendant shall be enjoined further against using the word "Waltham," or "Waltham, Mass.," upon the plates of its watches without some accompanying statement which shall distinguish clearly its watches from those made by the plaintiff. The judge who heard the case found that it is of considerable commercial importance to indicate where the defendant's business of manufacturing is carried on, as it is the custom of watch manufacturers so to mark their watches, but nevertheless found that such an injunction ought to issue. He also found that the use of the word "Waltham," in its geographical sense, upon the dial, is not important, and should be enjoined.

The defendant's position is that, whatever its intent and whatever the effect in diverting a part of the plaintiff's business, it has a right to put its name and address upon its watches; that to require it to add words which will distinguish its watches from the plaintiff's in the mind of the general public is to require it to discredit them in advance; and that if the plaintiff, by its method of advertisement, has associated the fame of its merits with the city where it makes its wares instead of with its own name, that is the plaintiff's folly and cannot give it a monopoly of a geographical name, or entitle it to increase the defendant's burdens in advertising the place of its works.

In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds and would be extended further were it not for the other: *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 149, 150. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manu-

facturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full ⁸⁷ extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its desideratum in some way, whatever the loss to the plaintiff. On the other, we think the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense.

It is true that a man cannot appropriate a geographical name, but neither can he a color, or any part of the English language, or even a proper name, to the exclusion of others whose names are like his. Yet a color, in connection with a sufficiently complex combination of other things, may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line: *New England Awl etc. Co. v. Marlborough Awl etc. Co.*, 168 Mass. 154, 156, 60 Am. St. Rep. 377. So, although the plaintiff has no copyright on the dictionary or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words unqualified and unexplained, when they would mislead the plaintiff's customers to another shop: *Reddaway v. Banham*, [1896] L. R. App. Cas. 199. So the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares: *Brinsmead v. Brinsmead*, 13 Times L. R. 3; *Reddaway v. Banham*, [1896] L. R. App. Cas. 199, 210. See *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 204; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. Rep. 643. And so, we doubt not, may a geographical name acquire a similar association with a similar effect: *Montgomery v. Thompson*, [1891] L. R. App. Cas. 217.

Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom.

We cannot go behind the finding that such a deceitful diversion is the effect and intended effect of the marks in question. We cannot go behind the finding that it is practicable to distinguish the defendant's watches from those of the plaintiff, and ⁸⁸ that it ought to be done. The elements of the precise issue

before us are the importance of indicating the place of manufacture and the discrediting effect of distinguishing words on the one side, and the importance of preventing the inferences which the public will draw from the defendant's plates as they now are on the other. It is not possible to weigh them against each other by abstractions or general propositions. The question is specific and concrete. The judge who heard the evidence has answered it, and we cannot say that he was wrong.

Decree for the plaintiff.

TRADE NAMES—GEOGRAPHICAL NAMES AS.—Geographical names cannot, as a rule, be appropriated and used as trade names; and one using such a name in his business cannot prevent others from using it in like manner. A company cannot exclusively appropriate the word "Nebraska" as a trade name by incorporating under the name "Nebraska Loan and Trust Company," and enjoin others in the same business from using the same name, where there is no conflict of interest nor opportunity for the public to be deceived. The rule applicable to trademarks upon manufactured goods does not apply to such a case: *Nebraska Loan etc. Co. v. Nine*, 27 Neb. 507, 20 Am. St. Rep. 686. By long use as a trademark a geographical name may acquire a secondary significance, and, instead of designating the place where an article is made, indicate its origin, or that it is the product of a particular manufacturer, or made according to his method. Where such is the case, it becomes a valid trademark: *Metcalf v. Brand*, 86 Ky. 331, 9 Am. St. Rep. 282.

FRANKEL v. FRANKEL.

[178 MASSACHUSETTS, 214.]

HUSBAND AND WIFE—SUITS BETWEEN.—A SUIT IN EQUITY can be maintained by a wife against her husband to recover her separate property obtained from her by his fraud and coercion, but an action at law cannot.

CONTEMPT.—IMPRISONMENT FOR CONTEMPT IS NOT IN ANY JUST SENSE A PUNISHMENT; the object of such proceedings is to compel obedience on the part of the defendant to the decree of the court, and not to punish him as for a crime or a violation of law.

M. L. Lourie, for the plaintiff.

S. C. Brackett, for the defendant.

215 MORTON, J. The property which the plaintiff seeks to recover is her separate property, and was obtained from her, as the court has found, by the fraud and coercion of her husband. She cannot maintain an action at law against him (Pub. Stats., c. 147, sec. 7), and unless this bill can be maintained she will be

without a remedy. That of itself is not a sufficient reason for a decree in her favor, but we think that she is entitled to the relief which she seeks. The section referred to above does not forbid suits between husband and wife, but simply provides that it shall not be construed to authorize them. It would seem, therefore, that equitable remedies may be availed of as before between husband and wife in cases where they apply: See *Butler v. Butler*, L. R. 16 Q. B. Div. 374. Indeed, it would be strange if, in the matter of equitable remedies, the rights of married women have been restricted when in other respects they have been so much enlarged. Suits between husband and wife in respect to her separate estate, or matters growing out of ante-nuptial or post-nuptial contracts in marriage settlements or property held in trust for the wife's benefit form a well-established head of equitable jurisdiction: *Ayer v. Ayer*, 16 Pick. 327; *Scott v. Rand*, 115 Mass. 104; *Fowle v. Torrey*, 135 Mass. 87; *Butler v. Butler*, L. R. 16 Q. B. Div. 374; ²¹⁶ *Healey v. Healey*, 3 Dick. 239; *Story's Equity Jurisprudence*, 10th ed., secs. 1366 et seq. In the present case, the judge may have found, and we assume that he did find, that the defendant received the money from his wife in trust to put it in a bank for her. If he had invested it in land in his own name, he would have held the title for her. It did not alter the case that instead he put the money in bank in his own name. In *Lombard v. Morse*, 155 Mass. 136, it was held that a husband could maintain a bill in equity against his wife to recover property which she had obtained from him by fraud shortly before and in contemplation of marriage. And in *Fry v. Fry*, 7 Paige, 461, referred to in *Lombard v. Morse*, 155 Mass. 136, a conveyance from the wife to the husband after marriage was set aside on the ground that it was improperly obtained by him by taking advantage of her ignorance of her rights, and her confidence in him: See *Stiles v. Stiles*, 14 Mich. 72, also referred to in *Lombard v. Morse*, 155 Mass. 136.

The decree orders the return of the money, and the defendant contends that, if he should be imprisoned for contempt for failing to comply with it, the effect would be to punish him for something for which he could not be punished in any other way and which would not be a crime. But the object of proceedings for contempt would be to compel obedience on the part of the defendant to the decree of the court, and not to punish him as for a crime or a violation of law. Any penalty that might be imposed would be coercive in its character, and not in any just sense a punishment. The proceedings would not, therefore, be

open to the objection urged by the defendant: *People v. Court of Oyer and Terminer*, 101 N. Y. 245, 54 Am. Rep. 691.

The result is that the decree must be affirmed.

So ordered.

CONTEMPT—PROCEEDINGS FOR PUNISHMENT OF.—A contempt is generally in the nature of a criminal offense, and the proceeding for its punishment is criminal in its character: Note to *Ex parte Robertson*, 11 Am. St. Rep. 214. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, or in doing some act injurious to a party protected by order of the court which has been forbidden by its order, the proceeding is punitive, and by way of punishment: Note to *State v. Knight*, 44 Am. St. Rep. 816.

Suits between Husband and Wife, When They may be Maintained.

At Common Law, the fiction prevailed of the complete unity of husband and wife. They were recognized as one, and that one was the husband, the legal existence of the wife being merged in that of her husband. From this idea of unity have sprung most of the disabilities under which married women have labored for so many centuries. The theory of an indissoluble unity is fundamental and is sound in every way, but the disabilities of married women which were deemed to spring from this theory were not natural corollaries, but were purely technical in their nature. The disabilities which were effected by this union, as between husband and wife, were logical deductions, which affected the husband as vitally as the wife. But the outgrowths of this sound fiction of unity, which were applied to the wife alone, were illogical and not necessarily based on any sound public policy. It is one thing to say that because of the unity of husband and wife they cannot contract with nor sue each other, since a person cannot make a contract with nor bring an action against himself. It is quite another thing to say that because of the unity of husband and wife, therefore the wife cannot contract with nor sue a third party. As between themselves, they may be one, but as to third parties they certainly are separate individuals. It is necessary to grasp this distinction between the fundamental unity of husband and wife and the excrescences that sprang therefrom, for by means of it the decisions under various married women's acts may be explained and to some extent harmonized.

At common law, then, a husband could not bring an action at law against his wife, nor a wife against her husband. The disability was mutual: *Doe v. Daly*, 8 Q. B. 934; *Chestnut v. Chestnut*, 77 Ill. 346; *Hobbs v. Hobbs*, 70 Me. 383; *Peters v. Peters*, 42 Iowa, 182; *Barton v. Barton*, 32 Md. 214; *Pittman v. Pittman*, 4 Or. 298. If the wife cannot sue the husband at law, he certainly cannot confess judgment in her favor: *Countz v. Markling*, 30 Ark. 17. And in an action at law by the wife against the husband, coverture

may be pleaded in bar of the action: *Roseberry v. Roseberry*, 27 W. Va. 759.

At Common Law—Suits after Dissolution of Marriage.—Since the bar to suits between husband and wife exists by reason of their unity, it would seem that when this unity came to an end and the relation was dissolved, either by divorce or death, the bar would be completely removed, and the parties might bring suits against each other, or against their representatives, if dead. Hence we find the principle laid down that after marriage has been dissolved by divorce or death, suits may be maintained at law. In *Albee v. Cole*, 39 Vt. 319, in allowing the representative of a wife to sue the husband in trover, the court said: "It is true that the testator in her lifetime could not have maintained at law an action of trover against the defendant. But this was not from any want of right or title in the property, or because the act of the defendant was not a wrongful and unlawful conversion of her property, nor because she was without remedy to redress the grievance. It was by reason of a personal disability a wife is under, incapacitating her to sue her husband at law. Her remedy would have been ample in a court of equity in her lifetime. Her administrator succeeds to all her rights, but we are not prepared to hold that, in enforcing those rights, he is necessarily restricted in his remedy to the very remedy to which the intestate was limited by reason of the personal disability of coverture, whereby she is legally incapacitated to sue her husband at law. It is true the administrator represents the intestate and succeeds to her rights, but he is not under her disability. So far as the disability arising from the coverture of the intestate affected her rights, or the substantial merits of her claim, her representative must be affected; but beyond that there does not seem to be any sound reason why that disability of the testator, which was merely personal, and only affected the mode of her relief, should embarrass or control her representative in the form of remedy. If he is not thus restricted, then, although the intestate could not have recovered of her husband at law in assumpsit for the money he collected and wrongfully appropriated to his use, yet her administrator might resort to that remedy." This ruling was followed in *Webster v. Webster*, 58 Me. 139, 4 Am. Rep. 253, where the marriage relation had been severed by divorce. The court held that the objection to the maintenance of the suit arising from the marital relation was purely technical, and was obviated by the divorce which had been secured. In *Blake v. Blake*, 64 Me. 177, a husband, after divorce, was allowed to sue his wife to recover the value of improvements which he had made on her real estate. And in *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307, a divorced wife was allowed to recover from her husband in an action at law for personal services performed for him before their marriage: See, further, *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520; *Davidson v. Smith*, 20 Iowa, 466; *Barton v. Barton*, 32 Md. 214; *Lane v. Lane*, 76 Me. 521. New Jersey seems to have established a stricter rule: *Wood v. Chetwood*, 44 N. J. Eq. 64.

While the general principle, then, is clear that after the disability has been removed by divorce or death suits at law may be maintained, it is not true in its entirety, and suits for all causes cannot be brought. And here again we notice the distinction between the fundamental unity of husband and wife as affects their personal relations and rights, and the technical outgrowths of this idea. Divorce or death severed this unity, and all technical doctrines that sprang from it were destroyed by its dissolution. But while dissolution could remove barriers, it could not create rights. And nothing could furnish a right of action at law after divorce or death which could not be the subject of a suit in equity during the existence of the marriage relation. A divorce does not make the marriage void ab initio; it merely terminates the relation of husband and wife from the time of the divorce. The rights which exist between husband and wife during coverture, and which can be enforced in equity, are property rights alone, not personal, and even property rights are limited. In *Abbott v. Winchester*, 105 Mass. 115, a note given to the wife by the husband before marriage became a nullity on the marriage, and is not revived by the death of the husband. This doctrine might not be approved generally, but it serves to illustrate the principle that dissolution of the marriage relation cannot create rights, and, if no right exists during marriage, none will spring into existence at its termination. The rights of a wife and the substantial merits of her claim are the same after as during marriage. The only barrier removed by the severance of the tie is the technical one of parties or the right to use.

The question has arisen whether, after divorce, a wife could sue for a personal wrong committed on her while married, such as an assault and battery. In harmony with the principle above enunciated, it has been held that no such right existed, for it was nonexistent during the marriage relation. "She succeeds," said the court in *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, "after death or divorce to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive. Here there was none. A thing cannot continue after an event which does not exist before. It would not be the survival of a claim; but would be one newly created." The case of *Phillips v. Barnett*, 1 Q. B. Div. 436, is a well-considered one on this question. In denying the right of a wife to sue her husband after divorce for an assault committed on her during the marriage relation, the court said, through Blackburn, J.: "I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; but I think that, when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person. . . . The reason, there-

fore, why the wife cannot sue the husband for beating her must be because they are one and the same person. . . . Then, does the dissolution of the marriage by divorce make that a cause of action which was not so before? I do not see why it should."

In Equity.—A court of equity, as distinguished from a court of law, recognized that the husband and wife were separate individuals, capable of having rights even against each other which were enforceable. In consequence, equity has always recognized the right of the wife to sue the husband and of the husband to sue the wife: *Barber v. Barber*, 21 How. 582; *Lane v. Lane*, 76 Me. 521; *Wood v. Chetwood*, 44 N. J. Eq. 64; *Hutton v. Hutton*, 3 Pa. St. 100; *Porter v. Bank of Rutland*, 19 Vt. 410; *Barron v. Barron*, 24 Vt. 375. In *Higgins v. Higgins*, 14 Abb. N. C. 13, where a husband sued his wife in equity to have a trust declared, the court said: "At law, he would be without a remedy because of his inability to maintain an action against his wife, but it is one of the fundamental principles of courts of equity to extend their jurisdiction and powers of relief to cases in which the party has no legal remedy, or where that may be inadequate, and a right to substantial redress appears to be supported by the circumstances of the case. And within this principle it has been held that an action for equitable relief may be maintained by a husband against his wife."

Equity, however, does not recognize the complete individuality of husband and wife. The unity of husband and wife, while a fiction to some extent, is based upon sound public policy, and where it is public policy to insist on their unity, equity will seize upon this unity as a reason for refusing to enforce alleged individual rights. Property rights alone are recognized by a court of equity as capable of enforcement against husband and wife: *Lombard v. Morse*, 155 Mass. 136. In accordance with these principles, it is held that where either husband or wife by fraud obtains an unjust advantage over the other in regard to his or her property, a court of equity will as readily afford relief as it will between other persons not occupying that relation. In *Stone v. Wood*, 85 Ill. 603, a wife fraudulently and deceitfully represented to her husband that, if he would put the title to his house and lot in her name, she could sell the same, pay his debts, and give him the balance. He united with her in a deed to a supposed purchaser, but who took the conveyance in trust for the wife, and the proof showed that the wife was untrue to her husband, and the grantee was a party to the fraud to deprive the husband of the property. In granting relief to the husband the court said: "There can be no doubt that a man may have relief from such frauds as this, in equity, against his wife. So may the wife against the husband. There is nothing in the marriage relation that can prohibit it. If it were not so, there would be a wrong without a remedy. That courts are seldom called on in such cases, does not militate against the rule. It is a fraud that is not sanctioned by that relation": See *Meldrum v. Meldrum*, 15 Colo. 478; *Basye v. Basye*, 152 Ind. 172. A wife

may be held responsible for money of the husband which she has appropriated contrary to his will and in violation of legal right: *Davidson v. Smith*, 20 Iowa, 466. Promises made by the husband to the wife in respect to her separate property are enforceable in equity by the wife: *McC Campbell v. McC Campbell*, 2 Lea, 661, 31 Am. Rep. 623. And he may be compelled to pay money to her which belongs to her in her sole right: *Jones v. Cannon*, 8 Houst. 1. On the other hand, promises made by the wife to the husband, to convey to him property the title to which has been taken in her name, will be enforced in equity against the wife: *Wormley v. Wormley*, 98 Ill. 544. A wife may sue to protect her property from sale under execution against her husband: *Bridges v. Phillips*, 25 Ala. 136, 60 Am. Dec. 495. She may also sue her husband to secure a suitable provision for herself out of her choses in action which he is seeking to reduce to possession. Such a suit can only be brought, however, when the husband is obliged to resort to a court of equity to secure possession of her choses in action. If the husband can acquire possession without any suit at all, either at law or in equity, or by an action at law without the assistance of a court of equity, the wife cannot sue: *Wiles v. Wiles*, 3 Md. 1, 56 Am. Dec. 733.

The usual cases in which a wife sues her husband in equity are where she asks relief in respect to her separate property, or where she seeks a separate provision out of her property. But she may also sue where he improperly interferes with her rights so as to make it necessary for her to defend herself against his unwarranted claims on her property, as where property held by a trustee for the benefit of herself and her husband jointly was by the trustee conveyed to her husband absolutely, suit may be brought to reinstate the trust: *Walter v. Walter*, 48 Mo. 140. See, also, *Reed v. Painter*, 145 Mo. 341. Equity may remove the husband from the trusteeship of the wife's estate, at the request of the wife: *Whitman v. Abernathy*, 33 Ala. 154; *Bryan v. Bryan*, 35 Ala. 290. And where she owns real estate as tenant in common with her husband, she can maintain a suit against him for partition: *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466.

It will be noticed that all the cases heretofore cited related to the property rights of the wife, and the contracts enforced concerned the wife's property. Property rights and property contracts alone are enforceable between husband and wife. And by "property rights" we mean rights respecting her separate property, and by "property contracts" we mean contracts made on the credit of, or for the benefit of, her separate estate. A married woman cannot make a personal obligation not connected with nor charging her property, nor bind herself by a mere personal promise: *Jenne v. Marble*, 37 Mich. 319. See *Slms v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679. The case of *Morrison v. Thistle*, 67 Mo. 596, seems opposed to this view. But, it is submitted, that so far as the common-law rights of a wife are concerned, she could not make a contract which would bind

her personally apart from her separate estate. A mere personal promise could not be enforced in equity. The citations given in this case do not support the broad doctrine laid down by the court, and without exception sustain our statement made above: See *Gardner v. Gardner*, 7 Paige, 112; 2 *Story's Equity Jurisprudence*, secs. 1368, 1372.

Equity can furnish no relief for personal wrongs, either during coverture or after dissolution of the marriage relation. Here equity recognizes that while in their property rights they may be separate individuals, as to their personal rights they are one: See *Phillips v. Barnet*, 1 Q. B. Div. 436.

Equity recognizes the essential unity of husband and wife in another particular, viz., in the matter of procedure, and, while allowing the wife to sue her husband, insists that she shall do so by a trustee or next friend: *Lewis v. Elrod*, 38 Ala. 17; *Bridges v. McKenna*, 14 Md. 258; *Heck v. Vollmer*, 29 Md. 507; *Walter v. Walter*, 48 Mo. 140; *Dewall v. Covenhoven*, 5 Paige, 581; *Thomas v. Thomas*, 18 Barb. 149.

In most of the states, statutes have been passed permitting a married woman to bring an action in her own name, and where the necessity for the intervention of a next friend has been thus obviated by statute, a wife may sue her husband alone: *Wilkins v. Miller*, 9 Ind. 100; *Hardin v. Gerard*, 10 Bush, 259; *Taylor v. Slater*, 18 R. I. 797. Generally, where statutes are passed giving a married woman a right to sue alone, the only object of such legislation is to dispense with the necessity for the intervention of a next friend: *Matson v. Matson*, 4 Met. (Ky.) 262. In matrimonial causes the wife could sue alone without the intervention of a next friend even in the absence of statute: *Van Orden v. Van Orden* (N. J.), 43 Atl. Rep. 882.

Giving the wife a remedy at law and a right to sue her husband directly by an action at law does not take away her right to sue him in equity. In *Woodward v. Woodward*, 148 Mo. 241, after stating this proposition the court said: "It is a most familiar rule that when a remedy exists in equity, a subsequent grant of a remedy at law will not oust a court of equity of its jurisdiction unless the remedy is extinguished by a direct and positive prohibitory provision in the statute": See the principal case as well, and *Bridges v. McKenna*, 14 Md. 258. Equity still remains an appropriate forum in which to enforce rights between husband and wife. Contracts may therefore be enforced in equity: *Bishop v. Bourgeois* (N. J.), 43 Atl. Rep. 655. In such a case, rules of evidence as administered in a court of law will be applied in the proceeding in equity: *Buttlar v. Buttlar*, 57 N. J. Eq. 645, post, p. 648. Where, however, a statute confers a new right enforceable at law, which prior to the statute could not be recognized in equity, then the relief is confined exclusively to a law court and equity cannot assert jurisdiction: *Larison v. Larison*, 9 Ill. App. 27. In this case it was said of the Illinois statute: It "does more than give a new remedy—it changes

the entire rights of the parties, it removes the disability of marriage and creates the wife a feme sole for the purpose of acquiring, managing, and disposing of property; of contracting and being contracted with; confers upon her the legal title to her property, recognizes her separate existence, and gives her a legal standing in the courts of law, which she did not before possess, and thus new rights must be enforced in a court of law, the same as if she were a feme sole."

Statutory Changes.—Modern statutes have done much to enlarge the rights of married women to bring actions at law against their husbands during the continuance of the marriage relation. The right to sue is mutual, and, wherever the wife is given the right to sue her husband, a corresponding right is granted him. It must be admitted that the cases are conflicting to some extent even under statutes of the same general character. But if the distinction which we have already suggested is borne in mind, the reason for such conflict will be apparent.

Statutes under which it has been held that husband and wife may sue each other at law are of two general kinds—those in which all distinction between law and equity has been abolished, and which do not in terms refer to married women at all, and those which by their terms confer on married women the right to bring an action at law or the right of sole control of their property.

Under statutes of the first kind it is immaterial whether the form of action between husband and wife is at law or in equity. They have the right to sue in equity already, and, if the statute prescribes but one form of action, logically it is of no consequence whether the suit is one which under the old procedure was cognizable in equity or not. If the wife would have been entitled to relief in equity under the circumstances of the case, it is no objection that the form used is similar to an action at law. Thus, in *Whitney v. Whitney*, 49 Barb. 319, a wife sued her husband and prayed for a money judgment against him, obviously a legal action. The court allowed the relief, notwithstanding the objection that a wife could sue her husband only in equity, saying: "By the code, the distinction between actions at law and suits in equity and the forms of all such actions and suits, heretofore existing, are abolished. There is but one form of action for the enforcement and prosecution of private rights, and for the redress of private wrongs. The remedies, therefore, heretofore sought in a court of equity are now only to be obtained by the ordinary forms of proceedings according to the established practice of the court. I think, at common law, this action was maintainable in equity, and, as the code has abolished the distinction between equitable actions and actions at common law and the old forms of pleadings, that a case is presented in the plaintiff's complaint which makes out a good cause of action." And in a later New York case, *Wright v. Wright*, 54 N. Y. 437, the court said: "Under our present system of policy in respect to the relation of husband and wife, I do not see why a married woman may

not sue her husband to enforce any right affecting her separate property, in any form of action (if any distinct forms can be said to exist), in the same manner that she might sue any stranger; and such, I think, is the judgment of the courts."

The conflict in the decisions occurs under statutes which confer a right of action at law upon married women. Where an act specifically states that a wife may sue her husband at law, there can be no question about its meaning, and an action at law will be sustained: *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Larison v. Larison*, 9 Ill. App. 27. Where, however, the act conferring the right to sue at law is in general terms the meaning of the legislature is less obvious. It may have been the intention of the legislature to strike at the root of the matter and destroy the fiction of the unity of husband and wife and to recognize and establish, as far as possible, the separate and independent existence of the spouses in their relation to each other. On the other hand, the intention may have been merely to cut off those excrescent growths which sprang from the doctrine of the oneness of husband and wife. The decisions of the courts are colored by one or the other of these views, and, while the decisions cannot be harmonized by this view, it will serve to explain the reason for their conflict. The first view is admirably expressed by the court in *Gillespie v. Gillespie*, 64 Minn. 381: "The obvious intent and effect of these statutory provisions is to preserve the separate legal existence of a married woman in respect to all her rights of person and property, and, to the extent necessary to the full exercise and protection of these rights, to give her in her own name all the remedies in the courts which she would have if unmarried. . . . The clearly declared policy of the statute in respect to the relation of husband and wife is that the latter can, in her own name and in any form of action, sue the former to enforce any right affecting her property, the same as if he were a stranger. . . . To hold that she may only maintain an action in equity (which she could always do, by a trustee or next friend, in respect to her separate estate), would be to disregard not only the obvious spirit, but also the express language, of the statute, which declares that she shall have the right to appeal to the courts of law and equity for redress." In *Emerson v. Clayton*, 32 Ill. 493, under a statute giving a married woman the "sole control" of all her property, it was held that the act "designed to make, and did make, a radical and thorough change in the condition of a feme covert. She is unmarried, so far as her property is concerned, and can deal with it as she pleases. . . . We are well satisfied the act can have no very beneficial operation in favor of married women, or be effective in the protection of her separate property, unless the 'sole control' conferred upon her over it is made to extend to the commencement and prosecution of suits for its recovery, even against her husband, should he, contrary to her wishes, and in contempt of her rights, unlawfully interfere with it." To the same effect see *Smith v. Smith*, 20 R. I. 556. The

Indiana supreme court said, in *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679: "The legislation of this state has destroyed the unity in person between husband and wife, so far as their rights of property are concerned." Ohio recognizes to the full extent the right of a wife to sue her husband at law: See *Brenneman v. Brenneman*, 1 Ohio N. P. 332; *Hart v. Sarvis*, 3 Ohio N. P. 316.

On the other hand, there is much respectable authority which denies the right of a wife to sue her husband under statutes giving her the right to sue generally or the right to the sole control of her property. These cases are in line with those decisions relating to statutes which give the wife a right to contract with reference to her separate property, and which hold very generally that such statutes do not give the wife a right to contract with her husband: See *Heacock v. Heacock* (Iowa), 79 N. W. Rep. 353, where a large number of cases are collected. *Ilgenfritz v. Ilgenfritz*, 49 Mo. App. 127, is a good example of the cases which sustain the view that the unity of husband and wife is not touched by a statute giving the wife a right to sue, such a right relating only to her relations with third parties. In this case it was said: "In our opinion, neither of these statutes authorizes the wife to sue the husband at law. They give her the right to sue without joining her husband as a party plaintiff—she may bring her action independent of her husband—and a third party may sue her without joining the husband as a party defendant. But she is not empowered to sue her husband. The unity of husband and wife is not destroyed by these statutes. They are, as before these statutes, one legal entity in the eye of the law, except as they are separated by the express provisions of the statute or necessary implications arising from such provisions." To the same effect, see *Barton v. Barton*, 32 Md. 214; *Lombard v. Morse*, 155 Mass. 136. In this latter case the statute in terms denied the wife a right to sue her husband. In *Smith v. Gorman*, 41 Me. 405, the court said that the statute, being in derogation of the common law, "is not to be construed as giving the wife a right of action against the husband, unless it results from the express terms of the statute, or from necessary implication." In denying the right of a wife to sue her husband under a statute the terms of which were general, the supreme court of Pennsylvania said: "It is impossible to suppose that so important a branch of the subject as the right of action between husband and wife should not have been thought of, or, being thought of, should not have been granted in unequivocal terms, if intended to be granted at all. To legislators, versed in the principles of the common law, it would immediately suggest itself as a distinct and momentous departure from the legal policy of centuries, which ordinary phraseology, however general, would not commonly be understood to intend, and it is inconceivable that under such circumstances it should be granted obscurely and by implication": *Small v. Small*, 129 Pa. St. 366; *Kennedy v. Knight*, 174 Pa. St. 408. In *Kalfus v. Kalfus*, 92 Ky. 542, under a decree of court conferring on a married woman

the rights and privileges of a feme sole, it was held that the wife's powers as to her husband were not enlarged, except in so far as it gave her the power to control her own property, and that, therefore, she could not maintain an action at law against her husband. The court, in *Walker v. Reamy*, 36 Pa. St. 410, presented the problem in a very striking way, in construing a statute which declared that a woman should continue to use her property "as fully after marriage as before." "As the only object of the act," said the court, "was to afford a protection to the estates of married women, we may assume that it was not intended that she should so 'fully' own her 'separate property' as to impair the intimacy and unity of the marriage relation. It was not intended to declare that her property should be so separate that her husband could be guilty of larceny of it, or liable in trespass or trover for breaking a dish or a chair, or using it without her consent. It was not intended, by allowing her to own her property 'as fully after marriage as before,' that he should not sit at her table, or use her furniture or house, without her consent specially given, or that she might have an action of assumpsit against him for use and occupation of her house, or for the use of her carriage, or for boarding at her expense, or that she may obtain a divorce, a mensa et thoro, by an action of ejectment. It was not intended that her property should be so separately hers that she might invest her funds in cattle, or ships, or notions, or menageries, or wagons, without his consent, and turn drover, or shipmaster, or common carrier, or traveling showman, or peddler. The unity of the marriage relation forbids this, and our common sense saves us from such an interpretation of the law."

It must be confessed that the liberal construction of married women's acts have not been productive of the greatest domestic harmony, and it is a question whether a strict construction of these statutes is not promotive of better results: See, for example, *Leahy v. Leahy*, 97 Ky. 59. The proper adjustment of property rights has proved something of a difficulty as well. In *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324, a wife was allowed to bring an action against her husband to recover the possession of her lands, of which he had taken possession and was cultivating solely for his own use, and damages for withholding the same. But the court said that the husband's marital right of occupancy could not be impaired, and his right of ingress and egress to the dwelling and society of his wife continues, so that a writ of possession must be so framed as to put the wife in possession without putting the husband out.

Whether such interpretation has proved wise or not, nevertheless, as indicated above, a statute giving a married woman the right to use and contract in regard to her separate property as freely as if she were unmarried does in some states confer a right to sue at law both her husband and third parties, and a right to sue generally will often be interpreted as granting a right of action at law against her husband. Where such legislation is regarded as not attacking

the unity of the marriage state, so far as it affects the parties thereto, such legislation will give to neither spouse a right to sue the other at law, and express terms or reasonable intendment are required to confer this boon on husband or wife.

Statutory changes, in general, do not destroy the equitable remedy which has always been permitted to both husband and wife, and equity will still accept jurisdiction of suits between the parties to a marriage contract: *Bridges v. McKenna*, 14 Md. 258. Where, however, the statute confers new rights enforceable at law, equity cannot acquire jurisdiction to enforce such rights. Statute may also completely alter the jurisdiction exercised by courts of law and of equity, and confine the remedies between husband and wife to courts of law: *Larison v. Larison*, 9 Ill. App. 27.

Statutory Changes—What Actions may be Brought at Law.—In those jurisdictions, then, in which it is held that husband and wife may sue each other at law, what character of actions may be brought? Even where the separate individuality of the spouses has been most broadly recognized, the door to suits has not been thrown wide open, and to a certain extent the union of the marriage relation is still more than a fiction.

A wife may maintain an action of ejectment against her husband to recover the possession of her separate real property: *Crater v. Crater*, 118 Ind. 521, 10 Am. St. Rep. 161; *Wood v. Wood*, 83 N. Y. 575; *Buckingham v. Buckingham*, 81 Mich. 89. Compare *Payton v. Payton*, 86 Ga. 773. In Pennsylvania, a wife may maintain ejectment against her husband where they are living separate, but otherwise it seems not: *McKendry v. McKendry*, 131 Pa. St. 24.

A married woman may maintain against her husband an action of trover for the conversion by him of her personal estate: *Smith v. Smith*, 20 R. I. 556. The right of action being mutual, the husband may also sue his wife in trover: *Mason v. Mason*, 66 Hun, 386; *Bardell v. Parkhurst*, 19 Hun, 358. Assumpsit may be maintained: *Clark v. Clark*, 49 Ill. App. 163.

Personal property may be replevied by the wife from her husband: *Bush v. Groomes*, 125 Ind. 14; *Jones v. Jones*, 19 Iowa, 236; *Howland v. Howland*, 20 Hun, 472. It may be recovered in any appropriate form of action, as detinue: *Scott v. Scott*, 13 Ind. 225; *Bruce v. Bruce*, 95 Ala. 563. It has even been held that a wife may garnishee her husband in an action to recover from a third person: *Tunks v. Grover*, 57 Me. 586.

In some states a wife is allowed to sue her husband at law to recover possession of her separate property only when he has deserted her without cause: See *Johnston v. Johnston*, 7 Pa. Dist. 555; *Reinhold v. Reinhold*, 7 Pa. Dist. 565; *Adams v. Adams*, 51 Conn. 135.

Concerning the right to recover for a debt or any other claim due a wife from her husband, the New York courts have laid down the broad doctrine that "when the wife, by proper and sufficient proof, shows that her husband owes her, she is entitled to the same reme-

dies, and has the same standing to enforce any security for the payment of the debt that she may have received, as any other creditor": *Manchester v. Tibbetts*, 121 N. Y. 219, 18 Am. St. Rep. 816. And in *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194, the California supreme court said that limitations as to the kind of actions that may be maintained by a wife, when they concern her separate property, or are against her husband, did not exist in that state. A wife may sue directly on a note made by her husband which she has acquired from a third person: *Franklin Sav. Bank v. Greene*, 14 R. I. 1, 51 Am. Rep. 336; *May v. May*, 9 Neb. 16, 31 Am. Rep. 399. See, also, *Grubbe v. Grubbe*, 26 Or. 363.

At common law, a man could not confess judgment in favor of his wife nor allow a judgment by default to be entered against him: *Countz v. Markling*, 30 Ark. 17; but under the modern statutes this may generally be done: *Bennett v. Bennett*, 37 W. Va. 396, 38 Am. St. Rep. 47; *Simmons v. Thomas*, 43 Miss. 31, 5 Am. Rep. 470. Even in Pennsylvania, it seems, a husband may confess judgment in favor of his wife, though generally they may not sue each other: *Lahr's Appeal*, 90 Pa. St. 507. The Pennsylvania statutes have, however, been subject to much change, and this decision might not prevail at the present time.

Broad and far-reaching as some of these decisions certainly are, yet the doctrine that husband and wife may sue each other at law has its limitations, which are well defined. In the first place, it must be remembered that legislation which confers a right of action at law upon a married woman is aimed primarily at procedure, and is not in the least concerned with the creation of rights: *Matson v. Matson*, 4 Met. (Ky.) 262. Hence, if an act gives the wife a right to sue her husband at law, such right is confined to cases which, prior to the passage of the act, were cognizable in a court of equity. Her rights are not enlarged by the act; merely barriers are removed in reference to remedies which she can pursue, and which, conversely, may be used against her. We have already noticed that the rights which could be enforced by and against a wife in equity were property rights and property contracts, and that personal contracts could not be enforced against the wife nor could personal rights grow out of their relations, which could be enforced against either. Statutes authorizing suits at law do not enlarge the class of rights which may be enforced in such a forum, and statutes specifically authorizing property suits do not confer any right to bring a personal action. In the absence of authority to contract freely with her husband, a wife cannot make a mere personal obligation not connected with nor charging her property, nor bind herself by a mere personal promise. Hence a wife cannot be sued on a personal covenant for the payment of rent on a lease from the husband to the wife: *Jenne v. Marble*, 37 Mich. 319. In *Chestnut v. Chestnut*, 77 Ill. 346, where a proceeding by scire facias was brought against the husband by the wife, the court, in denying the

right to bring such a proceeding, said: "Scire facias is a suit at law. We have no warrant, under any statute or otherwise, for holding a married woman has any right to an action at law against her husband, except in cases where it may be deemed indispensable to enable her to recover or enjoy her separate property. . . . In *Emerson v. Clayton*, 32 Ill. 493, it was thought the 'sole control' which the statute gives a married woman over her separate property necessarily confers the power to do whatever is needful to the effectual assertion and maintenance of that right, and the statute, by implication, gave her power to prosecute suits for its recovery, in her own name, for any unlawful interference with it, even against her husband; but further than that the law has not gone." In *Heacock v. Heacock* (Iowa), 79 N. W. Rep. 353, the same limitation of the right of a wife to sue her husband was recognized, the court saying "that the legal fiction of the oneness of husband and wife has not been entirely effaced," and "all disabilities which the common law imposes upon husband and wife by reason of the marriage status still exist, except in so far as they have been modified or changed by express statutory enactment." Of course, if statute confers a right it may be enforced at law if that happens to be the proper forum: Consult *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194. But, in the absence of statute, a wife can, at law, enforce against her husband only such rights as she may have in her separate property.

This limitation on the right of a husband and wife to sue each other becomes more clear when their personal relations are considered, and a right of action is sought to be maintained for a tort committed by one upon the other. Such a right certainly did not exist under the common law, and no redress, outside of divorce, and the criminal courts, could be had for such a personal wrong. The being of the wife was merged in the being of her husband, and a tort committed by either on the other was a wrong to one's self and not to another, so far as a civil action was concerned. In *Abbe v. Abbe*, 22 N. Y. App. Div. 483, where the wife sued the husband to recover damages for a personal assault, the court said: "While the wife is given full enjoyment of her separate estate and of her earnings, is permitted to carry on a separate business, may contract with her husband and sue him for debt or for a conversion of her property, yet, for the purpose of being a subject for an assault and battery by the husband, she is both wife and husband, and, therefore, without civil remedy." In *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, the court, in denying the right to sue, said: "It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. In an assault was actionable, then would slander and libel and other torts be." See as supporting the same rule as applied to torts in general, including assault and slander, *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589; *Freethy v. Freethy*, 42 Barb. 641; *Phillips v. Barnet*, 1 Q. B. Div.

436. In *Peters v. Peters*, 42 Iowa, 182, it was urged that a right of action for a tort was of itself property, and, as the wife could sue for the protection of any of her property, she could therefore sue to recover damages for a tort committed on her person. To this the court replied: "It is quite evident that this course of reasoning assumes the very thing to be established. Section 2204 authorizes the wife to maintain an action against her husband for the recovery of her property; and *Musselman v. Galligher*, 32 Iowa, 383, recognizes the doctrine that when a right to sue for an injury exists, that right is property. Before any conclusion favorable to the appellant can be drawn from these premises, the right of the wife to maintain an action against the husband for a tort must be either admitted or assumed. In other words, the argument involves the admission or assumption of the thing undertaken to be proved. The argument, fully expressed, is as follows: The wife may sue the husband for her property; when a right exists to sue for a tort, that right is property; the right of the wife to sue the husband for a tort exists; therefore the wife may maintain an action against the husband for a tort; or the wife may sue the husband for a tort, because the wife has a right to sue the husband for a tort." The wife may naturally be given a right to sue her husband for a tort, if a statute to that effect is passed.

To conclude, husband and wife have, from the earliest period, possessed the right to sue each other in equity, but only for the protection of property rights. The right to sue at law during the existence of the marriage is dependent entirely on statute, a mere right to sue being confined to those cases which, under the old procedure, were cognizable in equity; but if other rights are conferred by statute, these may be enforced at law. After the dissolution of the marriage relation, the parties could, even at common law, enforce in an action at law those rights which, during the existence of the marriage, were enforceable in equity. In the absence of express statutory authority, an action arising out of a personal tort cannot be maintained in any forum.

ADAMS v. BATCHELDER.

[178 MASSACHUSETTS, 268.]

INSOLVENCY—DISCHARGE IN—ACTION ON JUDGMENT—CONFLICT OF LAWS.—A discharge in insolvency of a resident of one state will not bar an action against him upon a judgment recovered in another state by a resident thereof, upon a debt contracted there, where the action is brought by an ancillary administrator of the estate of the deceased judgment creditor, who is also a resident of such other state, but appointed in the state granting the discharge.

A. M. Lyman and C. C. Barton, Jr., for the plaintiff.

G. R. Swasey, for the defendant.

268 HOLMES, J. This is an action of contract brought upon a New Hampshire judgment obtained by a man domiciled in New Hampshire, upon a debt contracted in New Hampshire, against a resident of Massachusetts. The judgment creditor died, and the present plaintiff, also a resident of New Hampshire, was appointed his administratrix there. On April 18, 1881, the plaintiff was appointed ancillary administratrix in Massachusetts. On January 21, 1891, the defendant received a discharge in insolvency in Massachusetts. At the trial there was evidence that the debt never had been paid, but the judge ruled that the discharge was a bar to the action. The case is here upon an exception to that ruling.

The ruling raises the question whether the debt is to be regarded as due to a person resident in Massachusetts, within the meaning of the Public Statutes, chapter 157, section 81. The defendants' position is that, as the debt could not be collected except by taking out ancillary administration here, it must be taken to be due to the plaintiff in her capacity of ancillary administratrix, and not as a natural person; and that, as that office has its birth and life **269** in Massachusetts, the plaintiff in that capacity has her residence here, just as a corporation has its domicile in the state which created it: *Bergner etc. Brewing Co. v. Dreyfus*, 172 Mass. 154, 70 Am. St. Rep. 251. But this argument is working a fiction too hard. An executor or administrator is not a corporation sole. He gets his title or his succession to the rights of the deceased by his appointment, it is true. Nowadays he holds those rights in a fiduciary capacity, and he must account for what he receives. But there is no absolute separation of his artificial from his natural personality, as is shown by the fact that a suit against an executor may end in

a judgment *de bonis propriis*, either at common law or under the Public Statutes, chapter 166, section 10, and very frequently may lead to a personal judgment for costs, as also that in general his contracts as such bind him only personally, even when he is entitled to indemnity from the estate: *Durkin v. Langley*, 167 Mass. 577. A judgment recovered by an administrator is payable to him personally, and may be sued on by him in another state: *Talmage v. Chapel*, 16 Mass. 71. And it has been held that, when a chattel is taken from an administrator wrongfully, he may sue for it in another state into which it has been carried: *Crawford v. Graves*, 15 La. Ann. 243; *Story on Conflict of Laws*, sec. 515; *Dicey on Conflict of Laws*, 459, 460. See *Commonwealth v. Griffith*, 2 Pick. 11, 18. What is true of an executor is even more plainly true of an ancillary administrator. And as one person can have but one domicile, unless the law for this purpose treats the woman and the ancillary administratrix as two persons, the plaintiff is a resident of New Hampshire, since no one would contend that her residence was changed for all purposes by her merely accepting an appointment here.

In the present case there is also another consideration. The debt was not suspended until the appointment of the ancillary administratrix. It was the property of the principal administratrix so far that a payment to her would have been a bar to the present action: *Wilkins v. Ellett*, 9 Wall. 740; 108 U. S. 256. See *Story on Conflict of Laws*, sec. 515, note; *Dicey on Conflict of Laws*, 461; or that the debt could have been sued for and collected there before the ancillary letters were issued, and that, if collected in Massachusetts, it would be transmitted to New Hampshire and accounted for there, unless there happened to be 260 local claims against the estate. We presume that the right to sue the debtor in New Hampshire, if service could be got there, was not affected by the ancillary appointment. As is said in *Wilkins v. Ellett*, 108 U. S. 256, 258, the objection to the principal administratrix's bringing an action here "does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him": See *Hutchins v. State Bank*, 12 Met. 421, 425; *Anthony v. Anthony*, 161 Mass. 343, 351, 352; *Swift, C. J.*, in *Slocum v. Sanford*, 2 Conn. 533, 535.

Perhaps this branch of the argument so far is not unanswerable. But there is the further fact that the debt already had been reduced to judgment. Whatever may be the law as to sim-

ple contract debts, it was laid down three centuries ago, and still is repeated, that judgments are bona notabilia where the judgment was given. As applied to this case, at least, we may accept the statement: Sir John Needham's Case, in note to Daniel v. Luker, Dyer, 305; Kegg v. Horton, 1 Lutw. 399, 401; Gold v. Strode, 3 Mod. 324; Adams v. Savage, 1 Ld. Raym. 854; Attorney General v. Bouwens, 4 Mees. & W. 171, 191; Holcomb v. Phelps, 16 Conn. 127, 135; 1 Wms. Saund. 274 a, note 3. Taking all the elements into account, it seems to us that in this case, if ever, "the [administratrix] here is only the deputy or agent of the [administratrix] abroad": Dawes v. Head, 3 Pick. 128, 141 142. See, also, Merrill v. New England Ins. Co., 103 Mass. 245, 248, 4 Am. Rep. 548.

Whichever of the foregoing lines of thought we pursue, we are led to the conclusion that the debt is not barred. If we treat the debt as due to the ancillary administratrix, we cannot so far distinguish between her natural and her artificial person, in the present state of the law, as to say that she resides in Massachusetts as administratrix when as a woman she resides in New Hampshire. If we are to consider the question of title more nicely, the debt belongs to the principal administratrix, although she may not receive it except subject to local debts of the estate.

Exceptions sustained.

INSOLVENCY—CONFLICT OF LAWS.—An act declaring that a discharge granted thereunder shall "release the debtor from all claims, etc.," does not apply to a judgment recovered out of the state, based upon a contract made and to be performed there, when the creditor in nowise participates in the insolvency proceedings: Note to Pullen v. Hillman, 30 Am. St. Rep. 343. As to the effect of the discharge of an insolvent upon the rights of nonresident creditors, see the extended note to Murray v. Roberts, 15 Am. St. Rep. 212-221.

SCOLLANS v. ROLLINS.

[178 MASSACHUSETTS, 275.]

NEGOTIABLE INSTRUMENT—MUNICIPAL REGISTERED BOND AS.—An instrument not under seal, bearing on its face the words "Registered Bond," and which certifies that there will be due from the obligor, a municipal corporation, a stated sum to a specified individual, the instrument being transferable only at the office of the city treasurer, is not negotiable. Such instrument is not rendered negotiable by an indorsement by the payee authorizing its transfer on the books of the city treasury.

TROVER TO RECOVER NON-NEGOTIABLE INSTRUMENT FROM BONA FIDE PURCHASER.—A sale of a non-negoti-

able instrument to a purchaser in good faith and for value, by one who has got it feloniously from the true owner, does not divest the property of the true owner, and he may recover it in action for conversion.

ESTOPPEL BY NEGLIGENCE.—A person is not estopped by negligence, as a matter of law, from asserting his ownership of bonds, which he has intrusted, for safekeeping only, to brokers whose business it is to buy and sell securities, where the bonds were not intrusted to them in that capacity, and where a sale by the brokers could only be accomplished through the commission of a felony.

ESTOPPEL BY BLANK INDORSEMENT OF NON-NEGOTIABLE INSTRUMENT.—The true owner of a non-negotiable instrument is not estopped from asserting his ownership, where the instrument has been assigned by a blank indorsement on the back, and has been intrusted to another for safekeeping only, in the absence of evidence showing a custom for such instruments to pass from hand to hand like negotiable instruments.

Two actions of tort, for the conversion by the defendant of two bonds of the city of Boston. The bonds were delivered to plaintiff in payment of a debt by William Scollans, the original payee, each bond having blank instruments of assignment stamped on its back and properly signed and acknowledged. The plaintiff delivered the bonds to a broker for safekeeping. The broker pledged them to a bank, by whom they were sold to defendant. The broker, in a monthly statement to plaintiff, credited him with the bonds, which statement, the broker said, was merely for a receipt, the bonds being still in his safe and being kept for safekeeping only and not as collateral security or for sale.

J. E. Hannigan, for the plaintiff.

R. F. Sturgis, for the defendant.

277 BARKER, J. The documents for the conversion of which these actions are brought are described in the bill of exceptions and in the several declarations as bonds of the city of Boston. Although upon inspection of the copy of the bonds, which are a part of the bill of exceptions, they bear upon their faces the words "Registered Bond," they do not appear to have been under seal. Each document certifies that there will be due from the city, payable at the office of the city treasurer on the first day of April, 1913, to William Scollans, the sum of one thousand dollars, with interest at four per cent per annum, payable on the first day of April and October in each year. Each also bears upon its face a statement that it is transferable only at the office of the city treasurer. From this it results that, whether technically bonds or promissory notes, the documents

were not negotiable paper, and could not be made negotiable paper by any act or indorsement of William Scollans, the payee. When, intending to part with the property in the documents and in the rights of which they were the evidence, William Scollans delivered them to the plaintiff in payment of a debt, ²⁷⁸ the property in the documents and in the rights passed to the plaintiff. When so delivered to the plaintiff each document bore upon its reverse side a stamped writing signed by William Scollans, and acknowledged by him before a justice of the peace to be his free act and deed. This stamped writing was of the following tenor: "Value received, I assign . . . the within certificate of the city of Boston stock, and hereby authorize the transfer thereof on the books of the city treasury." These indorsements neither made nor purported to make the documents negotiable securities, within the meaning of the law-merchant. The documents remained in the same condition when they were stolen or feloniously embezzled by a person, to whom the plaintiff had intrusted them for safekeeping, and when they were pledged by him to a bank, and when they were sold at auction by that bank to the defendant, who thereupon filled in with its corporate name the blank in each indorsement, and presented the documents to the city auditor for cancellation, and received in return new certificates payable to the defendant.

Under our decisions the property of the true owner of documents of the nature of those now in question is not divested by a sale to a purchaser, in good faith and for value, from one who has got them feloniously from the true owner, nor by any subsequent dealing of such a purchaser with the documents, but the property remains with the true owner from whom they were feloniously taken. The real ownership in such documents follows the general rule as to the ownership of chattels, the only exception to which is as to property which consists of the currency of the country or securities which by the law-merchant are negotiable: *O'Herron v. Gray*, 168 Mass. 573, 575; 60 Am. St. Rep. 411. See, also, *Dame v. Baldwin*, 8 Mass. 518; *Jarvis v. Rogers*, 13 Mass. 105; 15 Mass. 389; *Mason v. Waite*, 17 Mass. 560; *Wheeler v. Guild*, 20 Pick. 545, 32 Am. Dec. 231; *Stanley v. Gaylord*, 1 Cush. 536, 48 Am. Dec. 643; *Worcester County Bank v. Dorchester etc. Bank*, 10 Cush. 488, 57 Am. Dec. 120; *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Wyer v. Dorchester etc. Bank*, 11 Cush. 51, 59 Am. Dec. 137; *Chapman v. Cole*, 12 Gray, 141, 71 Am. Dec. 739; *Gilmore v. Newton*, 9 Allen, 171, 85 Am. Dec. 749; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am.

Rep. 366; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Hinckley v. Union Pac. etc. R. R. Co.*, 129 Mass. 52, 37 Am. Rep. 297; *McCann v. Randall*, 147 Mass. 81, ²⁷⁹ 94, 9 Am. St. Rep. 666. See, also, *London Joint Stock Bank v. Simmons*, [1892] L. R. App. Cas. 201, 215; *Colonial Bank v. Cady*, L. R. 15 App. Cas. 267; *Earl of Sheffield v. London Stock Bank*, L. R. 13 App. Cas. 333; *London etc. Banking Co. v. London etc. Bank*, L. R. 20 Q. B. Div. 232; *Cole v. Northwestern Bank*, L. R. 10 Com. P. 354; *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374; *Shaw v. Railroad Co.*, 101 U. S. 557; *Knox v. Eden Musée Americain Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700; *Barnstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705; *Bangor Electric Light etc. Co. v. Robinson*, 52 Fed. Rep. 520.

As the plaintiff is yet the true owner of the documents which the defendant has surrendered for cancellation, and for which it has in return received new certificates payable to itself, the defendant cannot sustain the verdicts which were ordered in its favor, except by showing that the evidence offered would, as matter of law, show that the plaintiff is estopped from setting up his true ownership as against it. Such an estoppel must bear looking at from two sides. The indorsements upon the documents, when the defendant took them, contained a blank the presence of which made it uncertain whether the payee had parted with his title. The presence of the blanks informed the defendant that the instruments passed to it must be other than they then were to give the defendant a right to surrender them for cancellation, and to receive new certificates in exchange. Such blank transfers are consistent with the continued ownership of the person who has executed them, and are also consistent with the ownership of some other person than the bearer, and, where they do not purport in terms to confer ownership upon the bearer, the most which can be predicated of them, in the absence of evidence of custom or usage, is that they are made in aid of the true title, and not to defeat it, and that they are to be used only to help the true owner in procuring for himself the right of **registration and the other rights** of which the documents so indorsed are the evidence: See *France v. Clark*, L. R. 26 Ch. Div. 257. There was no evidence in the present case that such certificates with blank assignments pass in fact from hand to hand like negotiable instruments without inquiry as to the right of the bearer to dispose of them. Without such evidence we cannot assume that these documents were "in order" so as to make the act of ²⁸⁰ taking them without inquiry as to how the

title originally in the payee had come down to the bank of which the defendant bought "the act of a reasonable man reasonably dealing with matters of business": See *Williams v. Colonial Bank*, L. R. 38 Ch. Div. 388, 401; *Colonial Bank v. Cady*, L. R. 15 App. Cas. 267, 278. Unless it is the custom to regard such documents so indorsed as equivalent to securities to bearer, the blanks should have put the defendants upon inquiry, and they would not be in a position to contend that the true owner is estopped from asserting his title.

Again, examining this contention of title by estoppel in the light of the plaintiff's own conduct, we are of opinion that it cannot be said, as matter of law upon the evidence, that his conduct has been such as to prevent him from asserting his title against anyone. The plaintiff has neither himself made, nor knowingly allowed to be made, any representation that the bearer of these documents with their assignments could transfer the property in them. If the possession of the certificates by the bank with the blank assignments indorsed enabled the bank of which the defendant bought to make in substance such a representation to the defendant, the giving of that possession was not the act of the plaintiff, and was possible only because of the commission of a felony against him of which he was not cognizant and for which he was not responsible. The only other possible ground for an estoppel is negligence. While the plaintiff intrusted these documents to persons whose business it was, as bankers and brokers, to sell securities, he did not intrust them to the depositary for sale or to pledge, but simply for safekeeping; and he had good reason to suppose that the documents remained in a safe in an envelope marked with his own name, and sealed. The fact that the custodians of his securities were bankers and brokers, he not intrusting the securities to them in that capacity, did not make him responsible for an unauthorized sale, possible only through the commission of a felony: See *Cole v. Northwestern Bank*, L. R. 10 Com. P. 354, 369; *Wood v. Rowcliffe*, 6 Hare, 183; *Lamb v. Attenborough*, 1 Best & S. 831; *Heyman v. Flewker*, 13 Com. B., N. S., 519; *Jenkyns v. Osborne*, 7 Man. & G. 678; *M'Ewan v. Smith*, 2 H. L. Cas. 309; *Kingsford v. Merry*, 1 Hurl. & N. 503; *Hardman v. Booth*, 1 Hurl. & C. 803. If, therefore ²⁸¹ he was negligent, either in intrusting the certificates to his depositaries for safekeeping, or in not withdrawing them when he found that he had been credited with the certificates in account, and was falsely informed that they were still in the safe, or in continuing to trust to the honesty and integrity

of his depositary, that negligence would seem not to have entered into the transaction by which the defendant bought and paid for the certificates, and not to have been a proximate cause of their purchase: See *O'Herron v. Gray*, 168 Mass. 573, 577, 60 Am. St. Rep. 411, and cases cited. See, also, *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *White v. Duggan*, 140 Mass. 18, 20, 54 Am. Rep. 437; *Shepard etc. Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446. However this may be, we are of opinion that it cannot be held, as matter of law, that the plaintiff upon the evidence offered was guilty of negligence. He had at least the right to have that question passed upon by a jury.

Exceptions sustained.

NEGOTIABLE INSTRUMENTS.—MUNICIPAL BONDS drawn payable to bearer are negotiable as inland bills of exchange, and are payable at maturity only on presentation at the office of the city treasurer, or at the place made payable: *Bloomington v. Smith*, 123 Ind. 41, 18 Am. St. Rep. 310. Certificates of indebtedness issued by a municipal corporation are not negotiable: *Newgass v. New Orleans*, 42 La. Ann. 163, 21 Am. St. Rep. 368.

TROVER TO RECOVER COUPONS OF UNITED STATES BONDS will not lie against one who has in good faith received them and turned over the proceeds thereon to his principal: *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491. As to what species of property may be converted, see note to *Bolling v. Kirby*, 24 Am. St. Rep. 818. A bona fide purchaser of property from one who has stolen or embezzled it acquires no title, unless it consists of negotiable securities: *O'Herron v. Gray*, 168 Mass. 573, 60 Am. St. Rep. 411.

ESTOPPEL—CLOTHING ONE WITH INDICIA OF TITLE. Where an owner of things not technically negotiable has clothed another, to whom they are delivered in the method common to all mercantile communities, with the usual apparent indicia of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute: *Moore v. Moore*, 112 Ind. 149, 2 Am. St. Rep. 170.

KENDRICK v. RAY.

[173 MASSACHUSETTS, 305.]

TRUST—DECLARATION OF.—AN INSURANCE POLICY made payable "to and for the sole and separate use and benefit of E. A. T., trustee," indicates an intention to create a trust, and evidence of the oral and written declarations of the donor are admissible for the purpose of showing who is the beneficiary and what are the terms of the trust.

TRUSTS—MODIFICATION—INSURANCE POLICY.—While a voluntary trust, once clearly established, cannot be modified by subsequent declarations of the donor, yet where a trust is created by an insurance policy, the court may find that a letter written by

the donor to the company before the issuance of the policy, and containing a later direction than the application as to who the beneficiary should be, should control the application and modify the policy.

A TRUST IS ESTABLISHED if it appears that it was clearly and unequivocally declared and executed by the donor in favor of the claimant, and was made known by him to her, and was assented to by her.

TRUSTS.—A POWER OF REVOCATION is not inconsistent with the existence of a valid trust.

INSURANCE—ADMISSION OF LIABILITY—DEFENSE IN FAVOR OF THIRD PARTY.—If, in an action on an insurance policy, the company admits its liability, the plaintiff cannot set up, against one who has established a trust in his favor in the proceeds of the policy, any defense arising out of the by-laws of the company.

TRUSTS—INSURANCE—VALIDITY—PUBLIC POLICY.—A trust in the proceeds of an insurance policy is not rendered invalid as being against public policy by the fact that the beneficiary is the wife of a man other than the insured.

E. P. Kendrick and M. Dolan, for the plaintiff.

R. M. Morse and L. Bass, Jr., for the claimant.

308 MORTON, J. The evidence which was admitted against the plaintiff's objection was clearly competent. The policy was not made payable to the plaintiff's testator, whose life was insured, but "to and for the sole and separate use and benefit of E. A. Taft, trustee." The intention on the part of the plaintiff's testator to create a trust of some sort was thus clearly manifested. But neither the terms of the trust nor the name of the beneficiary was disclosed in the policy. For the purpose of showing who was the beneficiary, and what the terms of the trust were, evidence of the declarations, oral and written, of the donor were admissible: *Barrell v. Joy*, 16 Mass. 221; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 35 Am. Rep. 365; *Catland v. Hoyt*, 78 Me. 355. It is true that a voluntary trust once
309 clearly established cannot be modified or controlled by subsequent declarations on the part of the donor (*Chase v. Perley*, 148 Mass. 289), and the plaintiff contends that the direction in the application, that the policy be made payable to "E. A. Taft, trustee for self," shows that the insured was himself the beneficiary. But it was competent for the court to find that the letter to the general agent of the insurance company, which referred to the policy as something still in futuro, was sent and received before the policy was issued, and contained a later direction than the application and the one which was followed in writing the policy.

The question then remains whether there was evidence tending to show who the beneficiary was, and what were the terms of the trust, which warranted the finding in favor of the claimant. We think that there was.

The sealed letter addressed to Taft, which was found amongst the testator's papers after his death, clearly pointed out the claimant Ray as the beneficiary or cestui que trust, and directed the proceeds of the policy to be paid to her on his, the testator's, death. Of itself it would not have been enough. But it was competent for the court to find that what was said by the testator to the claimant in the conversations between them, the last one shortly before his death, which, as she testified, were to the same effect, though the word "trust" or "trustee" was not mentioned, constituted a notice by him to the claimant of the existence of the trust in her favor: See *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 35 Am. Rep. 365. The fact that the policy never was delivered to her or to Taft, and that the letter to Taft also remained in the testator's possession and its contents were unknown to the claimant and to Taft till after the testator's death, is not controlling or decisive against the claimant: *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 35 Am. Rep. 365.

It is sufficient if it appears that the trust was clearly and unequivocally declared and executed by the donor in favor of the claimant, and was made known by him to her, and was assented to by her: *Welch v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 35 Am. Rep. 365; *Urann v. Coates*, 109 Mass. 581; *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222.

³¹⁰ We think that there was evidence which warranted a finding in favor of the claimant on all of these points: See *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255; *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208; *Alger v. North End Sav. Bank*, 146 Mass. 418, 4 Am. St. Rep. 331.

If we assume that the donor might have revoked the trust at any time during his life, he did not do so, and a power of revocation is not inconsistent with the existence of a valid trust: *Stone v. Hackett*, 12 Gray, 227, 232.

The insurance company might have availed itself of any defenses afforded by its by-laws in an action by the plaintiff against it on the policy, but it admitted its liability, and paid the money into court. We do not see how the plaintiff can set up against the claimant matters arising out of the by-laws of the

insurance company. She does not rely upon the contract contained in the policy, but upon a trust perfected in her favor by the insured in regard to the proceeds of the policy: *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222.

We discover nothing which rendered the trust invalid on grounds of public policy, or inoperative as an attempted testamentary disposition of property. It is not necessary to consider in detail the rulings that were asked for, as we think that they are disposed of by what has been said.

Exceptions overruled.

TRUSTS—DECLARATIONS.—No certain form of words is required in the creation of a trust, but the intention must be complete and clearly manifest: *Estate of Smith*, 144 Pa. St. 428, 27 Am. St. Rep. 641. An unequivocal declaration of the owner of property that he holds it in trust for the benefit of a designated donee vests in such donee an absolute equitable title, though he is not informed of the trust: *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783.

TRUSTS—EVIDENCE TO EXPLAIN.—When the word "trustee" is inserted in a deed of land after the name of the grantee, and in a subsequent contract relating to the same land, he affixes this word "trustee" to his signature, such word indicates that the grantee takes the title in trust for another, and parol evidence is admissible to show for whom and for what purpose he was constituted a trustee: *Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224.

TRUSTS—INSURANCE.—It is well settled that a voluntary settlement of an insurance policy can be made in trust, and no notice of such action need be given the company. The terms of such settlement may be ascertained from letters written by the donor: *Note to Williamson v. Yager*, 34 Am. St. Rep. 211.

INSURANCE, LIFE—ASSIGNMENT OF TO STRANGER.—The authorities are conflicting, but the better rule seems to be that an assignment of a policy to one who has no insurable interest in the life insured is void as against public policy: *Note to Equitable Life Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 906. One may insure his life for the benefit of a stranger: *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. St. 99, 35 Am. St. Rep. 810.

TRUSTS.—A RESERVED RIGHT OF REVOCATION is not inconsistent with the creation of a valid trust: *Lines v. Lines*, 142 Pa. St. 149, 24 Am. St. Rep. 487.

McDONALD v. COMMONWEALTH.[17th MASSACHUSETTS, §22.]

CONSTITUTIONAL LAW—PUNISHMENT OF HABITUAL CRIMINALS.—A statute imposing a heavier penalty in the case of a previous offender, and providing that other offenses may be shown by convictions in this or another state or both, is not unconstitutional as denying to such offender a fair and impartial trial, nor as trying one for crimes committed in other states. In fixing a penalty, regard may be had to previous conduct without limiting it to the jurisdiction in which the last offense was committed.

CONSTITUTIONS.—ARTICLE 6 OF THE AMENDMENTS to the constitution of the United States does not apply to the states or to proceedings in state courts.

TRIAL—RIGHT OF PRISONER TO COUNSEL.—In Massachusetts, there is no constitutional provision guaranteeing counsel to a prisoner, and no statutory provision except in indictments for a capital crime.

CONSTITUTIONS—UNUSUAL PUNISHMENTS.—ARTICLE 8 of the amendments to the constitution of the United States, relating to cruel or unusual punishments, does not apply to the states.

CONSTITUTIONAL LAW—UNUSUAL PUNISHMENTS.—A STATUTE providing for the punishment of habitual criminals does not impose a cruel and unusual punishment, within the meaning of article 26 of the declaration of rights, since this declaration is directed to courts and not to the legislature.

CONSTITUTIONAL LAW—EX POST FACTO.—A statute imposing a heavier penalty in the case of a previous offender is not an *ex post facto* law.

CONSTITUTIONAL LAW—CRIMINAL TRIAL—CHARGING JURY.—Where a judge, in his charge, neglects to instruct the jury in reference to a count charging the defendant with being a habitual criminal, and after the jury has returned a verdict of guilty on the other counts, he instructs them on the habitual criminal charge, on which they return a verdict of guilty also, such procedure is not unconstitutional nor prejudicial to the defendant.

APPEAL.—AN ASSIGNMENT OF ERROR that the defendant waives no rights under the constitution of the United States or of the state alleges no errors which can be reviewed on appeal.

Writ of error to reverse a conviction upon an indictment charging defendant with forging and uttering certain checks. The indictment alleged two other convictions for similar offenses in New Hampshire. The second assignment of error was that the statute was unconstitutional which allowed the state to make bad character a part of its original case. The ninth assignment alleged that the defendant waived no rights under the constitution of the United States or of the state. The defendant being without counsel, the clerk instructed him as to what his rights were with reference to the selection of the jury. At the trial, the judge informed him of his right to examine each witness, to take the stand in his own behalf, and to address the jury. Other necessary facts appear in the opinion.

F. P. Murphy, for the plaintiff in error.

F. T. Hammond, assistant attorney general, for the commonwealth.

326 **MORTON, J.** The first assignment of error is based on a misapprehension of the Statutes of 1887, chapter 435, and of the offense with which the plaintiff was charged, and for which he was sentenced. The charge in the indictment was for forging and uttering certain checks in this state. The plaintiff in error was found guilty and sentenced for that, not for the crimes of which he had been previously convicted in New Hampshire and in this state. The Statutes of 1887, chapter 435, does not authorize a trial here for offenses committed in another state, or the imposition of a penalty for crimes committed elsewhere. It imposes a heavier penalty in the case of a previous offender, and provides that the fact that he has offended before may be shown by convictions in this or another state or both. There is nothing unconstitutional in these provisions. In fixing a penalty regard may be had to previous conduct without limiting it to the jurisdiction in which the last offense was committed: *Commonwealth v. Graves*, 155 Mass. 163. The statute is not in violation of the fourteenth amendment to the constitution of **327** the United States: *Sturtevant v. Commonwealth*, 158 Mass. 598. It does not operate to deprive a person sentenced under it of the equal protection of the laws. It bears alike upon all persons within the commonwealth and similarly situated, who have committed felonies in this state since it took effect, or who may commit felonies hereafter: *Tinsley v. Anderson*, 171 U. S. 101, 106. Whether the punishment is cruel and unusual, and may therefore come within the prohibition which forbids a state from abridging "the privileges and immunities of citizens of the United States," or from depriving any person "of life, liberty, or property without due process of law," will be considered later.

The second assignment is disposed of by what has already been said.

The third assignment rests on the contention that the allegations in regard to the previous convictions charge the crime of being an habitual criminal, and constitute a count which is improperly joined to those which precede it. It was necessary to allege and prove the previous convictions: *Tuttle v. Commonwealth*, 2 Gray, 505; *Commonwealth v. Cody*, 165 Mass. 133. If proved as alleged, they aggravated the offense with which the

plaintiff was charged, and, if he was convicted of that, required that he should be sentenced as provided by the statute. They did not constitute of themselves a crime, and the words of presentment, as if another count was begun with which the allegations were preceded, properly could be rejected as surplusage: *Sturtevant v. Commonwealth*, 158 Mass. 598; *Commonwealth v. Cody*, 165 Mass. 133; *Commonwealth v. Walker*, 163 Mass. 226.

In regard to the fourth assignment, it is to be said that there is no constitutional provision in this state guaranteeing counsel to a prisoner, and no statutory provision in respect to counsel, except in the case of an indictment for a capital crime: Pub. Stats., c. 150, sec. 19; Stats. 1891, c. 379, sec. 4; *Conant v. Burnham*, 133 Mass. 503, 506, 43 Am. Rep. 532. Article 6 of the amendments to the constitution of the United States does not apply to the states or to proceedings in state courts: *Commonwealth v. Whitney*, 108 Mass. 5. The agreed facts show that the rights of the plaintiff in error were carefully guarded and stated, and explained to him at the trial.

328 The fifth assignment is to the effect that the punishment provided by the statute is a cruel and unusual punishment, and is contrary to article 5 of the amendments to the constitution of the United States, and to article 26 of the declaration of rights. It is probable that article 8 instead of article 5 of the amendments to the constitution of the United States is intended, as the latter contains no reference to cruel or unusual punishments. But neither article 5 nor article 8 applies to the states: *In re Kemmler*, 136 U. S. 436, 446; *Commonwealth v. Hitchings*, 5 Gray, 482; *Commonwealth v. Whitney*, 108 Mass. 5.

A similar provision in regard to cruel and unusual punishments is found, however, in article 26 of the declaration of rights, except that the language there is that "no magistrate or court of law shall . . . inflict cruel or unusual punishments." As was said in *Sturtevant v. Commonwealth*, 158 Mass. 598: "This article is directed to courts, not to the legislature." It is for the legislature to determine what acts shall be regarded as criminal, and how they shall be punished. It would be going too far to say that their power is unlimited in these respects. Ordinarily the terms "cruel" and "unusual" imply something inhuman and barbarous in the nature of the punishment: *In re Kemmler*, 136 U. S. 436. But it is possible that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment. However that may be, it cannot be held, we think,

that the punishment is "cruel and unusual" where the statute provides, as it does here, that one who has been convicted in this state of a felony committed here since it went into effect, or who twice before in this state, or another state, or both, has been sentenced and committed to prison for terms of not less than three years each, shall be punished by imprisonment in the state prison for twenty-five years. The penalty was determined, no doubt, by the view that in such a case the criminal habit has become so fixed and the hope of reformation is so slight that the safety of society requires and justifies a long-continued imprisonment of the offender. The statutes provides, however, that if it appears to the governor and council at any time that the convict has reformed, they may release him conditionally for the residue ³²⁰ of the term. We think that the statute is not open to the objection of imposing a cruel and unusual punishment.

The sixth assignment is disposed of by what has been said in regard to the first assignment.

The seventh assignment rests on the contention that the statute is *ex post facto* in its character, and is disposed of not only by what has been said under the first assignment, but also by *Sturtevant v. Commonwealth*, 158 Mass. 598, where the same objection was taken and overruled.

The eighth assignment is: 1. That under the statute in question the plaintiff in error has been tried here for an offense committed in New Hampshire, and for which he was punished there; and 2. That the proceedings at the trial by which the jury, after returning a verdict upon the counts in regard to forging and uttering, were sent out again to deliberate upon the habitual criminal charge, and afterward returned a verdict upon that, were irregular, prejudicial, and unconstitutional. What has been previously said in regard to the nature of the offense with which the plaintiff in error was charged disposes of the first ground taken in this assignment. As to the second ground, it appears that the judge charged the jury, and they retired, and afterward came into court to render their verdict. They were asked by the clerk, as to the first, second, third, and fourth counts successively, whether the prisoner was guilty or not guilty and they returned a verdict of guilty on each count. Thereupon the clerk was about to inquire of them in regard to the habitual criminal charge, when the judge arose and said that he had forgotten to charge upon that, and proceeded to do so, and they retired again and afterward came into court and rendered a verdict of guilty on that part of the indictment. We see noth-

ing prejudicial or unconstitutional in this: *Pritchard v. Hennessey*, 1 Gray, 294; *Florence Sewing Machine Co. v. Grover etc. Sewing Machine Co.*, 110 Mass. 70, 82, 14 Am. Rep. 579.

It was within the power of the court to correct the error or omission in the way in which it did, and to send the jury out again, after it had rendered its verdict on the counts for forgery and uttering, to deliberate on the habitual criminal charge: *Mason v. Massa*, 122 Mass. 477; *Brown v. Dean*, 123 Mass. 254.

³³⁰ Under the ninth assignment, if it may be called such, no errors are alleged, and there is nothing for us to consider.

The result is, that, none of the errors assigned being supported, the entry must be judgment affirmed.

CONSTITUTIONS.—THE SIXTH AMENDMENT to the constitution of the United States applies only to proceedings in the federal courts for offenses against the United States: *Ex parte McNeely*, 36 W. Va. 84, 32 Am. St. Rep. 831.

CONSTITUTIONS—CRUEL AND UNUSUAL PUNISHMENT. The provision in the constitution of the United States, that "cruel and unusual punishment shall not be inflicted," is a restriction upon the national government only, and does not limit the powers of the states: *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322.

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT.—A statute providing that persons once convicted of crime shall suffer more severe punishment for subsequent offenses is not unconstitutional as inflicting cruel and unusual punishment: Note to *In re Miller*, 64 Am. St. Rep. 382.

CONSTITUTIONAL LAW—EX POST FACTO.—A statute imposing a greater punishment for a second offense, because of prior conviction of another offense, is not *ex post facto*: Note to *In re Miller*, 64 Am. St. Rep. 379; and see, too, *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542. *Ex post facto* laws are discussed at length in a monographic note to *People v. Hayes*, 37 Am. St. Rep. 582-596.

APPEAL.—AN ASSIGNMENT OF ERROR which is too general cannot be considered; it should point out specifically what is relied upon as error: *People v. De Fore*, 64 Mich. 693, 8 Am. St. Rep. 863; *Commonwealth v. Tolman*, 149 Mass. 229, 14 Am. St. Rep. 414. A court will decline to consider an uncertain and indefinite assignment of error: *National Fertilizer Co. v. Holland*, 107 Ala. 412, 54 Am. St. Rep. 101.

MOORE v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

[173 MASSACHUSETTS, 335.]

CARRIERS—CONNECTING—INJURY TO BAGGAGE—PRESUMPTION.—Where baggage is delivered to a carrier in good condition and is checked "through" to its destination, the passage being over several connecting roads, and at the end of the journey the baggage is found to be damaged, the presumption is that the injury occurred while it was in the control of the last carrier, and the burden is on such last carrier to explain that the loss was otherwise.

Action to recover damages to the contents of plaintiff's trunk. The judge of the trial court refused to rule that where baggage is delivered in good condition to one carrier for through passage over several connecting carriers, and upon delivery by the last carrier the baggage is found to be damaged, the presumption is that the injury was caused by the last carrier, and that the burden was on the last carrier to exonerate itself from this presumption. Judgment for defendant.

F. N. Nay, for the plaintiff.

C. F. Choate, Jr., for the defendant.

336 HOLMES, J. This is an action by a passenger to recover for damage to her luggage, suffered somewhere in the course of a **337** passage from Charleston, Tennessee, to Boston. The passage was over six connecting railroads; it does not appear where the damage was done, and the plaintiff seeks to recover upon a presumption that the accident happened upon the last road.

The so-called presumption was started and justified as a true presumption of fact, that goods shown to have been delivered in good condition remain so until they are shown to be in bad condition, which happens only on their delivery. But it was much fortified by the argument that it was a rule of convenience, if not of necessity, like the rule requiring a party who relies upon a license to show it: 1 Greenleaf on Evidence, sec. 79; Pub. Stats., c. 214, sec. 12. As we, in common with many other American courts, hold the first carrier not answerable for the whole transit, and not subject to an adverse presumption (*Farmington Mercantile Co. v. Chicago etc. R. R. Co.*, 166 Mass. 154), it is almost necessary to call on the last carrier to explain the loss, if the owner of the goods is to have any remedy at all. To do so is not unjust, since whatever means of information

there may be are much more at the carrier's command than at that of a private person. These considerations have led most of the American courts that have had to deal with the question to hold that the presumption exists: *Smith v. New York Cent. R.R. Co.*, 43 Barb. 225, 228, 229; affirmed, 41 N. Y. 620; *Laughlin v. Chicago etc. Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493; *Memphis etc. R. R. Co. v. Holloway*, 9 Baxt. 188, 191; *Dixon v. Richmond etc. R. R. Co.*, 74 N. C. 538; *Leo v. St. Paul etc. Ry. Co.*, 30 Minn. 438; *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 593; *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381; *Savannah etc. Ry. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551; *Faison v. Alabama etc. Ry. Co.*, 69 Miss. 569, 30 Am. St. Rep. 577; *Forrester v. Georgia R. R. etc. Co.*, 92 Ga. 699. In the opinion of the court, the weight of argument and authority is on that side. Mr. Justice Lathrop and I have not been able to free our minds from doubt because we are not fully satisfied that the court has not committed itself to a different doctrine. Still, it has not dealt with it in terms. In *Darling v. Boston etc. R. R. Co.*, 11 Allen, 295, the only question discussed was a question of contract. In *Swetland v. Boston etc. R. R. Co.*, 102 Mass. 276, the question was as ³³⁸ to frozen apples. It appeared that the weather had been very cold before delivery to the defendant. The presumption was not mentioned. These are the two nearest cases.

Judgment for the plaintiff.

CONNECTING CARRIERS—LIABILITY OF FOR BAGGAGE.

A railroad selling tickets and checking baggage over its own and other lines is liable for loss of baggage anywhere upon the route: *Louisville etc. R. R. Co. v. Weaver*, 9 Lea, 38, 42 Am. Rep. 654. Compare *Hart v. Rensselaer etc. R. R. Co.*, 8 N. Y. 37, 59 Am. Dec. 447; *Candee v. Pennsylvania R. R. Co.*, 21 Wis. 582, 94 Am. Dec. 566.

CONNECTING CARRIERS—LIABILITY FOR FREIGHT.—No distinction exists between the carriage of goods and passengers as to the liability of a railroad selling a through ticket beyond its terminus, and over connecting lines, and as to the liability of the receiving company for freight shipped beyond its own terminus over connecting lines: *Harris v. Howe*, 74 Tex. 534, 15 Am. St. Rep. 862. Where goods have been transported by successive carriers and damaged subsequently to shipment, it is presumed, in the absence of evidence to the contrary, that the damage was caused by the last carrier: *Note to Morganton Mfg. Co. v. Ohio etc. R. R. Co.*, 61 Am. St. Rep. 682; *Faison v. Alabama etc. Ry. Co.*, 69 Miss. 569, 30 Am. St. Rep. 577. Compare *note to Central R. R. Co. v. Hasselkus*, 44 Am. St. Rep. 43.

STEVENS v. McDONALD.

[173 MASSACHUSETTS, 332.]

TRIAL—WAIVER OF JURY.—An express declaration of a party is not necessary in order to constitute a waiver of his right to a jury trial. A waiver may be found from conduct.

TRIAL BY JURY—WAIVER OF BY CONDUCT.—A defendant waives his right to a trial by jury where, after the withdrawal of the plaintiff's request for a jury, and after the clerk has taken the case from the list of cases for trial by jury and has placed it on the jury waived list, though without any special order of court, he makes no complaint and no effort to have the case retransferred to the list of cases for trial by jury until the case is actually reached for trial.

Contract, on an account annexed. Defendant refused to proceed to trial, and filed a motion asking to have the action restored to the list of cases for trial by jury, and stating that the plaintiff had, within the time allowed by law, filed his claim for a jury trial; that the defendant examined the papers on file and ascertained that the plaintiff had filed his claim for a jury trial, and for this reason alone the defendant did not file a similar claim; that after the time for claiming a jury trial had expired the plaintiff filed a paper withdrawing his claim of jury trial. Defendant had no notice of the filing of this paper, and no leave of court for filing this paper was obtained. No motion was made to transfer the action from the jury list to the jury waived list. The judge overruled the motion.

I. F. Sawyer, for the plaintiff.

C. W. Rowley, for the defendant.

384 BARKER, J. The case was reached for trial in a jury waived session of the superior court for Suffolk, on June 24, 1898, having been upon the published list of cases for trial without a jury since the making up of that list prior to the beginning of the June sitting. Although, after the withdrawal of the plaintiff's request for a jury trial, the clerk had taken the case from the list of cases for trial by jury, and had placed it upon the jury waived list without any special order of court, the defendant made no complaint, and no effort to have the case retransferred to the list of cases for trial by jury until the case was actually reached for trial, when he refused to proceed to trial without a jury, and then filed his motion to expunge the plaintiff's withdrawal of his claim of jury trial, and to restore the action to the list of cases for trial by jury.

Neither our statutes nor the decisions in which they have been construed require any express declaration of a party to constitute his waiver of his right to a jury trial: See Stats. 1874, c. 248, sec. 1; Stats. 1875, c. 212, sec. 1; Pub. Stats., c. 167, sec. 69; Stats. 1894, c. 357; *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438; *Bailey v. Joy*, 132 Mass. 356; *Vitrified Wheel etc. Co. v. Edwards*, 135 Mass. 591; *Dole v. Wooldredge*, 142 Mass. 161, 182. In our opinion, the waiver may be found from conduct the only explanation of which, other than a design to obstruct the adverse party's right to obtain justice in the courts "promptly and without delay," is an assent to a trial without a jury. The inevitable effect of transferring the case to the jury list would have been a long delay. The presiding justice was justified in ruling, in consideration of the defendant's conduct since the case had been placed upon the jury waived list, that the granting or refusal of his motion was a matter within the discretion of the court, and in denying the motion.

In thus treating as a waiver the defendant's conduct in allowing the case to be actually reached for trial without asking ³⁸⁵ for a jury, we intimate no opinion upon the question whether his previous omission himself to file a notice that he desired a trial by jury was a waiver of his right.

No question is argued by the defendant upon the merits of the action.

Exceptions overruled.

JURY TRIAL—WAIVER OF BY CONDUCT.—If the parties, being present in court, submit their cause to the court upon the pleadings, evidence, and arguments of counsel, and these acts are entered upon the journal, they thereby waive a trial by jury: *Bonewitz v. Bonewitz*, 50 Ohio St. 373, 40 Am. St. Rep. 671. A constitutional provision declaring that a "jury trial may be waived in the manner to be described by law," does not preclude the court from holding that the parties have waived their right to such trial by their conduct or silence, although the case has not been provided for by any statute: *Note to Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 194.

PALMER v. GORDON.

[178 MASSACHUSETTS, 410.]

NEGLIGENCE—INJURY TO TRESPASSER.—A property owner, who does an act with reference to a trespasser's presence and directed against him, and that sufficiently clearly threatens the danger which it brings to pass, is liable to such trespasser for the injury caused, although he did not contemplate or intend actual damage.

G. A. Brown, for the plaintiff.

H. H. Newton, for the defendant.

⁴¹¹ HOLMES, J. This is an action of tort for personal injuries. We are to take it that the plaintiff, a boy, was a trespasser with some other boys in the kitchen attached to the defendant's restaurant, and that the defendant spilled water upon the stove for the purpose of frightening the boys away. He did not intend to scald them, but the water flew from the stove upon the legs of the boys. The question raised by the exceptions is whether the jury were warranted in finding the defendant liable.

It will be seen that this case falls between the cases of spring guns and the like, where the defendant is or may be in the same position as if he had been personally present and had shot the plaintiff, and the cases where, as against trespassers or licensees, railroads are held entitled to run trains in their usual way without special precautions: *Chenery v. Fitchburg R. R. Co.*, 160 Mass. 211, 213. In the case at bar, the defendant, although not contemplating or intending actual damage, did an act specifically contemplating the plaintiff's presence and directed against him. He left the safe position of a landowner simply pursuing his own convenience and assuming that no one would break the law and thereby bring himself into danger.

Just as a man may make himself liable to a negligent plaintiff by a later negligence (*Pierce v. Cunard S. S. Co.*, 153 Mass. 87, 89), he may make himself liable to a trespasser by an ⁴¹² act that is done with reference to the trespasser's presence, and that sufficiently clearly threatens the danger which it brings to pass. A trespasser is not *caput lupinum*. In the present case, the only element of doubt was whether the danger to the plaintiff was sufficiently obvious under the circumstances. That question properly was left to the jury.

Exceptions overruled.

NEGLIGENCE—INJURY TO TRESPASSER.—Damages are not recoverable by a trespasser or mere licensee who is injured by any dangerous machine or contrivance on the land of another, unless the contrivance is such as the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly, or through gross negligence of the owner or occupier of the premises: Note to *Armstrong v. Medbury*, 11 Am. St. Rep. 588. One is under no duty to a trespasser to keep his premises safe: *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262.

QUIGLEY v. CLOUGH.

[173 MASSACHUSETTS, 429.]

NEGLIGENCE—BARBED WIRE FENCE—LIABILITY FOR INJURIES CAUSED BY.—The erecting of a barbed wire fence wholly on one's own land and not along the line of the sidewalk, for the sole purpose of keeping off trespassers, is not the doing of an act in expectation of trespassers and with intent to do them harm, which will render such person liable within the meaning of the spring gun cases.

A. H. Russell and R. S. Bartlett, for the plaintiff.

A. Hemenway and S. D. Charles, for the defendant.

429 HOLMES, J. This is an action for personal injuries. The defendant had a house at the corner of two streets which were at right angles to each other, and the sides of the house were parallel to and at a distance from the streets. The defendant maintained a barbed wire fence running diagonally from the corner of his house across the grass to the corner of the streets. The plaintiff, by mistake, after dark left the line of the street, walked upon the grass, came against the fence, and was injured. The judge directed a verdict for the defendant, and the case is here on exceptions.

It does not need argument to show that this was not a fence maintained "along" a sidewalk within the Statutes of 1884, chapter 272, section 1. But it seems that there had been a plain wire fence in **430** the same place, which had been replaced by the present one, and it appeared that the defendant said that he put up this one because the plain wire fence did not serve his purposes. The plaintiff argues that, especially taking this indication of the defendant's purpose into account, the defendant is answerable on the principle of liability for spring guns: *Chenery v. Fitchburg R. R. Co.*, 160 Mass. 211, 213.

But we are of opinion that the ruling was right. Barbed wire is well known and has been widely used for fencing, as more efficient than common wire. Not only does experience not warrant saying that the use of it upon a man's own land, upon which he has a right to expect people not to trespass, shows an expectation that they will come there and an intent to hurt them when they do, but everyone knows the contrary, that barbed wire has been used by hundreds of people who had no malicious intent. It is or has been a common article of commerce, and the use of it simply shows an intent to make it more difficult to pass the line of the fence. Therefore, the limitation laid down in *Chenery v. Fitchburg R. R. Co.*, 160 Mass. 211, applies. The remark of the defendant confirms rather than weakens our conclusion. For it implies that the plain wire fence was put there with the same purpose as the barbed. The common purpose can only have been to prevent people from taking a short cut across the defendant's grass, and that is the common sense of the matter.

Marble v. Ross, 124 Mass. 44, goes at least to the verge of the law. But there the vicious stag was an active source of harm which attacked the trespasser. Here there was nothing but an inert object intended to prevent trespassing, which could do no harm unless the trespass itself brought the trespasser into contact with it: See *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253; *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364; *Howland v. Vincent*, 10 Met. 371, 43 Am. Dec. 442; *McIntire v. Roberts*, 149 Mass. 450, 452, 453, 14 Am. St. Rep. 432.

Exceptions overruled.

NEGLIGENCE—INJURY TO TRESPASSERS.—Damages are not recoverable by a trespasser or mere licensee who is injured by any dangerous machine or contrivance on the land of another, unless the contrivance is such as the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly, or through gross negligence of the owner or occupier of the premises. One is under no duty to a trespasser to keep his premises safe: Note to *Palmer v. Gordon*, ante, p. 302. See, also, note to *McAlpin v. Powell*, 26 Am. Rep. 562-567.

WOOD'S SONS COMPANY v. SCHAEFER.

[178 MASSACHUSETTS, 443.]

NEGOTIABLE INSTRUMENTS — PAROL AGREEMENT NOT TO ENFORCE.—A promise by the payee of a promissory note, made at the time of its delivery, that he will see that the note is not enforced according to its terms, cannot be proved to defeat an action on the note. Such agreement is collateral and purely personal.

NEGOTIABLE INSTRUMENTS—FAILURE TO SELL COLLATERAL SECURITY AS A DEFENSE.—If a defendant gives corporate stock as collateral security for his promissory note, it is no defense to an action on the note that the stock has declined in value, and that if the plaintiff had sold it in time it would have been sufficient to pay the note, where the defendant has made no request that the plaintiff sell.

CORPORATIONS—POWER OF OFFICER TO PROMISE SALARY.—A corporation is not bound by a promise made by its treasurer and director to a third party that such third party should be president at a stated salary, where such promise was never communicated to the other directors, and the corporate by-laws do not provide a salary for the president.

B. L. M. Tower, R. S. Bartlett, and E. O. Hiler, for the plaintiff.

W. R. Bigelow, for the defendant.

444 HOLMES, J. This is an action upon a promissory note. The defense is a denial that the transaction was what it appeared to be on the face of the papers. There is also a claim in setoff for services as president of the plaintiff corporation. At the trial, the plaintiff's evidence was that the plaintiff discounted for the defendant a note, of which the note in suit is a renewal, giving a check for fifty dollars less than the note, and receiving twenty-five shares of the Corson Coal Company as collateral security as soon as the defendant was able to release them from a previous pledge by the money thus obtained. The note and the certificate indorsed in blank by the defendant were produced, and the execution of the instrument was not denied. The defendant testified that, in view of services which he had rendered to the plaintiff, Edmund M. Wood, its treasurer and manager, agreed to buy the twenty-five shares of him, and gave him the check as payment for them, and that the defendant, to enable Wood "to square himself with his own corporation," from which the money came, gave Wood "the use of" the original of the note in suit with the shares as collateral security, Wood promising to take care of it when it should fall due. The judge left it to the jury to say whether the defendant's

story was true, and instructed them to find for him if they accepted it. They found for the plaintiff.

⁴⁴⁵ It would be hard to say that the course adopted did not save all the defendant's rights if the alleged agreement had been proved, although the instructions were not so specific as those asked. It really gave the defendant quite as good a chance to prevail upon his improbable story. But it is plain, further, that even on the defendant's account Wood's agreement was collateral and personal. The defendant's note was to be given to the company in order to justify Wood's draft upon it to pay for the shares. If the defendant did not contemplate a fraud on the company, the company was entitled to enforce the note, although Wood promised on his own behalf that he would forestall its doing so by paying it. Finally, if the defendant's counsel, contrary to the plain meaning of the defendant's evidence, wanted to contend that Wood's agreement was an agreement by the company not to enforce the note according to its tenor, such an agreement made at the time the note was delivered is in flat contradiction of the instrument, and cannot be proved: *Perry v. Bigelow*, 128 Mass. 129; *Hall v. First Nat. Bank*, 173 Mass. 16, ante, p. 255.

The shares held as security declined in value. A ruling was asked to the effect that, if the shares were given as collateral security either by the defendant or by Wood, and, if sold within a reasonable time after the maturity of the note, would have been sufficient to pay the note, the plaintiff cannot recover. Such is not the law. The defendant made no request that the plaintiff should sell, and nothing is disclosed in the evidence to prevent the plaintiff from doing what it liked: *Newsome v. Davis*, 133 Mass. 343.

The defendant's claim for setoff is also based upon a conversation with Wood, in which, as the defendant says, Wood, in gratitude, or more, for past services to the plaintiff, promised him that he should be president, with a salary of six hundred dollars for the first year. Subsequently, the defendant was elected president for the year 1896. There was no vote making any contract or giving any salary. On the contrary, by Wood's testimony, which probably was not controverted on the point at the trial, the plaintiff's by-laws "provided for payment of no salary whatever, either to president or treasurer." It does not appear that Wood's alleged promise ever was communicated to ⁴⁴⁶ the other directors, and there is nothing in the circumstances that would leave it more than a conjecture that the reason-

able interpretation of the defendant's coming there would have been that he expected to be paid. Wood was not even a holder of the greater part of the stock. Under our decisions his alleged contract with the defendant probably was void (*Commonwealth v. O'Brien*, 172 Mass. 248, 253), and there was no evidence on which the jury would have been warranted in finding a promise of pay by implication on the plaintiff's part: *Sawyer v. Pawnors' Bank*, 6 Allen, 207; *Pew v. Gloucester Nat. Bank*, 130 Mass. 391; *Bartlett v. Mystic River Corp.*, 151 Mass. 433; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 402, 403, 45 Am. St. Rep. 572.

Exceptions overruled.

NEGOTIABLE INSTRUMENTS—PAROL AGREEMENT NOT TO ENFORCE.—Parol evidence of declarations by a payee to the maker, indorser, or guarantor of a note, made at the time of signing, that such signer shall not be called upon to pay the note, is incompetent: *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180. This rule is equally applicable to alleged agreements to renew the note from time to time, until business conditions will enable the maker to pay it without injury to his business: *Hall v. First Nat. Bank*, 173 Mass. 16, ante, p. 255. But testimony of what the payee said to the maker before and at the time of the execution of a note is admissible to show fraud: *Richards v. Monroe*, 85 Iowa, 359, 39 Am. St. Rep. 301.

COLLATERAL SECURITY—FAILURE TO SELL STOCK HELD AS.—A pledgee who takes shares of corporate stock as collateral security for a promissory note, with authority to sell in case of non-payment of the note, is not bound to sell upon default in the payment of the note, and is not liable for a loss occasioned by a depreciation in the value of the stock occurring after the default: *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551; note to *Griggs v. Day*, 32 Am. St. Rep. 721.

CORPORATIONS—COMPENSATION OF OFFICERS.—A director elected treasurer by the board of directors is not entitled to compensation for services rendered as treasurer, unless the compensation has been fixed by a by-law or resolution before the services were performed: *Holder v. Lafayette etc. Ry. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *Martindale v. Willson-Cass Co.*, 134 Pa. St. 848, 19 Am. St. Rep. 706, and note.

BOLES v. MERRILL.

[178 MASSACHUSETTS, 491.]

RESCISSIION—FRAUDULENT REPRESENTATIONS IN A SALE.—Statements made during the negotiations for a sale of personal property and of the business in which it is used, by an agent who assumes to be the owner, that the business has certain regular customers who pay stated sums monthly, and that the business was earning a net sum yearly, are material representations, which, if made falsely and fraudulently, justify a rescission of the contract; but a mere statement that a third party had offered a certain sum for the property and business is mere dealers' talk.

RESCISSIION—LACHES.—A purchaser of a business who, within a week, discovers that the sale was fraudulent and offers to rescind, and, upon refusal, tests the matter further for two months, and then makes an absolute rescission, is not guilty of unwarrantable delay in rescinding the sale.

J. Bon and J. S. Richardson, for the plaintiff.

J. M. Browne, for the defendants.

491 LATHROP, J. This is a bill in equity, filed November 22, 1895, by the purchaser of certain personal property against the sellers and Gusteen I. Kenerson, their agent, to rescind a sale on the ground of false and fraudulent representations made by Kenerson, who effected the sale. The property consisted of certain horses and wagons and other articles used in an express business.

The master has found the following facts. The negotiations for the sale extended over ten days or a fortnight, and resulted **492** in the delivery of a bill of sale. The consideration paid by the plaintiff was five hundred dollars cash, and a negotiable promissory note for one thousand dollars, payable to the defendant Merrill or order, in regular monthly installments of thirty dollars each month, the first installment to be paid November 1, 1895, with interest monthly at the rate of six per cent per annum. This note was secured by a mortgage of the same property made by the plaintiff to Merrill. While the bill of sale was signed by Merrill and Mary J. Kenerson, the title to the property was in Merrill. Mrs. Kenerson, who was the wife of Gusteen I. Kenerson, held the property under a lease, dated August 22, 1894, by which she agreed to pay twelve hundred dollars in monthly installments of fifty dollars each, with interest. When the money was paid the articles were to become her property. Up to August, 1895, she had paid about three hundred and twenty-five dollars. The five hundred dol-

lars paid by the plaintiff was divided between two of the defendants, Mary J. receiving one hundred dollars and Merrill the remainder.

The master further found that during the negotiations and before the delivery of the bill of sale and the payment of the consideration thereof, Gusteen I. Kenerson made the following false and fraudulent representations: 1. After stating that at a prior time he had sold the property, he stated to the plaintiff that about January 1, 1895, he paid therefor two thousand dollars; 2. That he stated to the plaintiff that a man named Moore, engaged in the express business in Boston, was seeking to buy the business, and had offered him two thousand dollars for it, which he was to pay if he could raise the money; 3. That he had ten regular customers in the business, who each paid ten dollars a month, and that one customer named Marble paid sixty dollars a month; 4. That the business was earning him net at the rate of two thousand five hundred dollars a year.

The master further found that each of these statements was known by Kenerson to be false when he made them, and that they were made to induce the plaintiff to enter into the proposed trade; and that they were believed by the plaintiff, and influenced him to make the purchase.

The plaintiff took possession of the property under his bill of sale, September 9, 1895, and the express business was carried on by two brothers of the plaintiff for one week. At the end of the week the plaintiff learned that he had been deceived and defrauded, and on September 16th had an interview with the defendant ⁴⁹³ Gusteen I. Kenerson, in which the plaintiff notified him that he had been deceived and defrauded, and demanded back the money paid and the note given by him, and offered to return all the property. The defendant Kenerson refused to consent to any rescinding of the contract. The plaintiff's brothers continued the business until November 9, 1895, at a net loss, and on that day, at an interview between the plaintiff and the defendants Merrill and Gusteen I. Kenerson, the plaintiff notified the defendants that he had been deceived and defrauded, and demanded of them the money paid and the note given by him, and placed all the property in a stable in the name and subject to the order of the defendant Merrill, and gave Merrill written notice thereof. Subsequently, Merrill took possession of all the property under his mortgage, and sold it by public auction to the defendant Gusteen I. Kenerson, who took possession thereof. And at a subsequent date the business

and property were sold by the defendants to one Shannahan, who now is in possession thereof. The defendant Merrill was not shown to have had any knowledge of the plaintiff's dissatisfaction with the trade and transaction until said ninth day of November. No payment ever has been made by the plaintiff upon his mortgage note.

The master further found that the fair market value of all the property conveyed by the bill of sale of September 9, 1895, including the goodwill and all interest thereby conveyed, was at that time seven hundred dollars.

The master also found that on the facts stated the plaintiff was entitled to a decree that the note and mortgage for one thousand dollars were obtained by fraud and should be surrendered to the plaintiff; and that the defendants should repay the plaintiff the sum of five hundred dollars.

Subsequently, the case was heard on exceptions to the master's report, and a decree entered in accordance with the master's findings, with costs. The case is before us on an appeal by the defendants from this decree.

It is contended by the counsel for the defendants, in the first place, that some of the findings of the master are not warranted by the evidence. This point is not much insisted upon, and we are referred merely to the evidence in defense. While there was contradictory evidence on some points, we are of opinion ⁴⁹⁴ that the master's findings are fully sustained by the weight of the evidence in the case, and that a gross fraud was perpetrated on the plaintiff.

The defendants contend that the representations amounted merely to dealers' talk, which the law cannot take notice of. But the court of recent years has shown no disposition to extend the decisions in favor of vendors' representations beyond the limits to which they have gone: *Way v. Ryther*, 165 Mass. 226, 229; *Kilgore v. Bruce*, 166 Mass. 136, 138; *Andrews v. Jackson*, 168 Mass. 266, 268, 60 Am. St. Rep. 390. In the present case, Gusteen I. Kenerson assumed to be dealing with the property as an owner, while he was merely an agent of the other defendants. His statement that he had sold the property and bought it back was false and fraudulent, and while the price which he said he paid probably falls within the rule of dealers' talk (*Gassett v. Glazier*, 165 Mass. 473, and *Way v. Ryther*, 165 Mass. 226, and cases cited), yet, excluding the price, we have left representations which must be deemed material. The statement that Moore was seeking to buy the property and had made an

offer of two thousand dollars for it, which he was to pay if he could raise the money, seems to us to be merely dealers' talk: *Brown v. Castles*, 11 Cush. 348.

The statement by Kenerson that he had ten regular customers in said business who each paid him ten dollars a month, and that one customer named Marble paid sixty dollars a month, is not open to the objection that it is a promissory representation as to the future, nor can it be regarded as mere dealers' talk. It relates to a very material fact on which the plaintiff had the right to rely. The same is true of the statement that the business was earning him net at the rate of two thousand five hundred dollars a year: *Smith v. Everett*, 126 Mass. 304.

The remaining question is whether the plaintiff is entitled to rescind the sale. We see no reason why he is not. He discovered the fraud at some time during the first week after he took possession of the property. At the end of the week he notified Kenerson, and demanded back the money paid and the note given by him, and offered to return all the property. The latter refused to consent to any rescinding of the contract. The plaintiff then tested the matter further, and carried on the business for two months, when he made an absolute rescission, and ⁴⁹⁵ placed the property at the disposal of Merrill. It does not appear that the property was not in as good condition at this time as when the sale was made. Under the facts of the case, we are of opinion that there was no unwarrantable delay in rescinding the sale, and that the decree of the superior court should be affirmed: See *Smith v. Everett*, 126 Mass. 304; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25.

So ordered.

RESCISSION.—FALSE REPRESENTATIONS by a vendor, which constitute an inducement to buy, are grounds upon which a purchaser may rescind a contract of sale: *Wilson v. Carpenter*, 91 Va. 183, 50 Am. St. Rep. 824. A misrepresentation by the vendor of a saltpeter mine, of the amount of saltpeter which a given quantity of earth will produce, will authorize a rescission of the contract of sale: *Perkins v. Rice*, Litt. Sel. Cas. 218, 12 Am. Dec. 298.

RESCISSION.—LACHES.—A party to a contract, who has a right to rescind it on account of fraud, must exercise such right within a reasonable time after discovering the fraud; for a person defrauded must act promptly to repudiate a fraudulent transaction, and must do nothing in affirmance of the contract or retain any benefits thereunder: Note to *Arnold v. Hagerman*, 14 Am. St. Rep. 724. As to how and when rescission must be exercised, see monographic notes to *Bryant v. Isburgh*, 74 Am. Dec. 657-662; *Johnson v. Evans*, 50 Am. Dec. 672-681.

PENNEY v. COMMONWEALTH.

[173 MASSACHUSETTS, 507.]

EMINENT DOMAIN—DAMAGES RECOVERABLE.—Where an easement in land is taken, under a statute which provides that all damages sustained by any person by the taking of his land shall be paid for, the amount in damages is not limited to the value of the land or easement taken, but damages to the remaining land, such as the destruction of crops and the drainage of wells in the construction of the work for which the land is taken, can be recovered, even though after the completion of the work the water returned to the soil and the wells as it was before, and the damage was only temporary.

EMINENT DOMAIN—DAMAGES—WHO MAY RECOVER.—A petition to assess damages to land by the diversion of the water supply, caused by taking an easement in the land for the construction of a sewer, may be maintained by the owner after he has conveyed the premises, and after his vendee has recovered damages for the taking of the easement, where the damages occasioned by the diversion of the water were excepted from the conveyance.

R. Lund and P. B. Kiernan, for the petitioner.

J. M. Hallowell, assistant attorney general, for the commonwealth.

507 MORTON, J. Under the Statutes of 1889, chapter 439, as amended by the Statutes of 1890, chapter 270, the Metropolitan sewerage commissioners took an easement **508** in a strip of land belonging to the petitioner, for the purpose of constructing and maintaining a main sewer. In constructing the sewer they drained the petitioner's premises and wells, thereby causing him to lose his crops, and subjecting him to great damage in his business, which was that of a market gardener, and depriving him of the use of the wells for his family and for the purpose of watering his stock. After the sewer was finished, the supply of water returned and was as before. The petitioner conveyed the premises to one Richard Penney after the taking, excepting from the conveyance the damages occasioned by the diversion of water during the construction of the sewer. Subsequently, pursuant to a judgment duly entered upon proceedings instituted by Richard Penney, his representatives were paid in full, without objection by the commonwealth, for what is denominated the easement, though the payment did not include all of the damages. The present petition is by the owner of the premises at the time of the taking. He does not seek to recover for the damages that have already been paid, but limits his claim to those that have not; that is, to the damages occasioned by the diversion of the water.

The court ruled that the petition could not be maintained, and directed a verdict for the respondent. The question before us is whether this ruling was right.

The statute under which the commissioners took the easement and constructed the sewer provides that the commonwealth "shall pay . . . all damages that shall be sustained by any person or corporation by reason of such taking": Stats. 1890, c. 270, sec. 1. The commonwealth contends that the taking for which it is liable in damages is limited to the acquisition of a title to the land or easement taken, or, what is the same thing, to the value of the land or easement taken, and that, for any other damages caused by the construction and maintenance of the sewer to the remaining premises, the remedy of the petitioner, if he has any, is by an action at law. But the taking involved, not only the acquisition of a title, but the appropriation of the land or easement to the use for which it was taken, and the statute provides that all damages caused by the taking shall be paid for. We do not see, therefore, how the damages to be assessed can be limited only to those arising from the acquisition ⁵⁰⁹ of a title, or how they can be held to exclude damages to the remaining lands caused by the construction of the sewer. It never has been laid down as a general rule of law, we think, in this commonwealth, that, when land or an easement in it belonging to the petitioner has been taken, the damages to which he was entitled should be limited to the value of the land or easement, and did not include damages caused to his remaining premises by the construction of the work for which the land or easement was taken. In *Rand v. Boston*, 164 Mass. 354, no land of the petitioner or easement therein was taken. In *Bacon v. Boston*, 154 Mass. 100, the statute was a peculiar one, and provided that the city should "make compensation to the owners for such lands as it shall take under this act," and was held to include only lands actually taken; and in that case no land of the petitioner was taken. In this case the statute provides that all damages sustained by any person or corporation by reason of the taking shall be paid; and land of the petitioner was actually taken. The difference between those cases and this is evident.

In *Lincoln v. Commonwealth*, 164 Mass. 368, which was under the same statute as this petition, the jury were permitted to include in their assessment damages which would be caused to the remaining land by the construction of the sewer. There is nothing in that case to warrant the view that the damages

are limited to the value of the land or easement taken. To the same effect is *Taft v. Commonwealth*, 158 Mass. 526, in which the same case under a different name was before the court. See, further, *Butchers' etc. Assn. v. Commonwealth*, 169 Mass. 103, which also was under the same statute, and *Dana v. Boston*, 170 Mass. 593.

In *Sheldon v. Boston etc. R. R. Co.*, 172 Mass. 180, it was held, under the grade crossing acts (Stats. 1890, c. 428; Stats. 1891, c. 123), which provide for the payment of "all damages sustained by any person in his property by the taking of land," that one whose well had been drained was entitled to recover damages therefor, though his land had not been taken. A fortiori would he have been entitled to recover such damages if a part of his land had been taken.

It is not necessary to consider the cases in which, or the statutes ⁵¹⁰ under which, recovery has been allowed for damages to the remaining land, or in which recovery has been allowed for damages when no land was taken. There have been many such cases. The last expression of the views of the court is to be found in *Sheldon v. Boston etc. R. R. Co.*, 172 Mass. 180. It never has been the rule in this commonwealth that only such damages can be recovered in cases like this as there would have been a right of action for at common law, and we think that under the statutes which authorized this taking it was the plain intent of the legislature that all damages sustained by a person or corporation by the taking of his land and the construction of a sewer therein should be paid for. In theory, such damages should be paid for at the time when the land was taken and devoted to the public use, and the owner would be entitled to compensation for all such direct and peculiar damages to his remaining land as reasonably might be anticipated to occur in consequence of the taking and of the construction of the sewer. In practice, payment is not made then; but the fact that it is not does not alter the rule, or entitle the owner to maintain an action at law for damages to his remaining land arising in the course of the work for which the land was taken. He is bound at his peril to anticipate all such damages as may arise and are incident to the taking of the land and the construction of the work.

The respondent relies upon the cases of *Chelsea Dye House etc. Co. v. Commonwealth*, 164 Mass. 350; *Cabot v. Kingman*, 166 Mass. 403, and *Magee Furnace Co. v. Commonwealth*, 166 Mass. 480. But in each of these cases the sewer was constructed in a

public street. It did not appear in either case that the fee of the street was in the petitioner, and, as the court said in *Cabot v. Kingman*, 166 Mass. 403, it was in effect decided in the *Chelsea Dye House* case that, if the petitioner owned the fee, "no additional servitude was imposed upon the land under the highway," and "no right of any sort was taken in the petitioner's land." The cases are, therefore, quite different from the one before us.

The respondent further contends that the damages were temporary, and therefore not recoverable. It is possible that there may seem to be some excuse for this view in *Lincoln v. Commonwealth*, ⁵¹¹ 164 Mass. 1, 10, and in *Chelsea Dye House etc. Co. v. Commonwealth*, 164 Mass. 350. But in *Lincoln v. Commonwealth*, 164 Mass. 368, it was "temporary interruptions of business caused by the construction of the sewer along the highway," for which it was held that the petitioner could not recover—meaning, we think, such interruptions as would be incident to the construction of the sewer, and common to all having occasion to use the street. We doubt whether *Chelsea Dye House etc. Co. v. Commonwealth*, 164 Mass. 350, goes any farther than *Lincoln v. Commonwealth*, 164 Mass. 368, which is cited in it as authority for what is there said in respect to temporary damages. Certainly, it would seem that it could not have been intended without referring to them in any way to overrule *Patterson v. Boston*, 23 Pick. 425, in which Shaw, C. J., held that the petitioner could recover for loss of business and earnings, and for rent which he was compelled to pay for other premises during or in consequence of the widening or alteration of a street, and the same case in 20 Pick. 159, and the case of *Brooks v. Boston*, 19 Pick. 174, 177, where evidence of damages similar to those allowed by Chief Justice Shaw was held competent by Wilde, J. See, also, *Chicago etc. Ry. Co. v. Hock*, 118 Ill. 587. In *Brown v. Providence etc. R. R. Co.*, 5 Gray, 35, damages occasioned to buildings by blasting were allowed. Such damages naturally would be quickly repaired, and therefore in a sense temporary, but no objection seems to have been made to their allowance on that ground. It would be going much farther than any case has gone in this state to hold where a statute provides, as is the case here, that all damages sustained by any person or corporation by the taking of his land shall be paid for, that damages to the remaining land from the destruction of crops and the drainage of wells in the construction of the work for which the land was taken cannot be recovered

for, because, after the completion of the work, the water returned to the soil and the wells as it was before, and the damage was therefore to be regarded as temporary. At common law, it is no objection to recovery that the damage may be temporary or quickly repaired, and we see nothing in the statute to prevent the petitioner from recovering for the loss of his crops and the damage caused by the draining of his wells and the diversion of the water. It is all special and ⁵¹² peculiar to him, and the direct and natural result of the taking of his land and the construction of the sewer.

The respondent also contends that the petitioner is barred by the proceedings in the name of his assignee and the recovery and payment of damages therein. We do not think so. The respondent could have objected to the maintenance of that suit in the name of the assignee, and could have insisted that the petition should be brought in the name of this petitioner, as it ought properly to have been, when all the damages could have been assessed in one proceeding. The fact that it did not see fit to object cannot affect the right of the petitioner to maintain this action. He was not a party to that proceeding, and is not bound by anything that occurred therein.

The result is that, in the opinion of a majority of the court, the verdict must be set aside, and the case stand for trial.

So ordered.

EMINENT DOMAIN—WHAT CONSTITUTES TAKING PRIVATE PROPERTY.—It may be stated as a general principle that where the lawful rights of an individual to the possession, use, and enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken for public use: *Notes to Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 612; *Jordan v. Benwood*, 57 Am. St. Rep. 869. For an extended discussion of this question, see monographic notes to *Pappenheim v. Metropolitan etc. Ry. Co.*, 26 Am. St. Rep. 498-507; *Currie v. Waverly etc. R. R. Co.*, 19 Am. St. Rep. 458-460.

EMINENT DOMAIN—DAMAGES.—Under a statute allowing damages resulting from sewer improvements, whether any of his land is taken or not, a landowner can recover for the draining of his well due to such improvements: *Bickford v. Hyde Park*, 173 Mass. 552, post, p. 320.

NATIONAL GRANITE BANK v. WHICHER.

[178 MASSACHUSETTS, 517.]

HUSBAND AND WIFE.—A PROMISSORY NOTE signed by a wife, payable to the order of her husband, and indorsed by him together with other persons, is void at common law and under the Massachusetts statutes relating to married women, even though the note after indorsement is given to a person in payment of a debt of the wife to him.

Contract upon three promissory notes, made by the defendant, payable to the order of her husband, and indorsed by him and others to the plaintiff. It appeared that defendant's husband and another were indebted to the plaintiff partnership on notes aggregating fifteen thousand dollars. In the reorganization of the plaintiff partnership it was sought to cancel this indebtedness. A check payable to defendant's order was drawn and signed by the cashier of plaintiff bank. The check was indorsed by defendant and deposited to the account of her husband's firm, a check being drawn against it for the payment of original notes of defendant's husband and another. Defendant executed the three notes in suit, and at the time was not indebted to her husband, and did not understand that she was becoming indebted to him, or that she put herself under obligation to pay him or anyone fifteen thousand dollars, and contended she had never said she had borrowed fifteen thousand dollars from the plaintiff and loaned it to her husband's firm.

C. H. Hanson, for the plaintiff.

S. H. Tyng and J. P. Prince, for the defendant.

520 LATHROP, J. This is an action on three promissory notes, signed by the defendant, payable to the order of her husband, and by him, together with other persons, indorsed. That such a note is void by common law, which law has not been changed by our statutes relating to married women, is too plain for argument: *Gay v. Kingsley*, 11 Allen, 345. Nor does it make any difference that the note, after being indorsed by the husband, is given to a person in payment of a debt of hers to him: *Roby v. Phelon*, 118 Mass. 541.

In *Slawson v. Loring*, 5 Allen, 340, 81 Am. Dec. 750, on which the plaintiff chiefly relies, it was held that an indorsement of a draft by a husband to his wife, and her subsequent indorse-

ment of it with his assent to a third person, were sufficient to vest in the latter a valid title. This case, as an authority, has been limited to its particular facts. Speaking of it in *Roby v. Phelon*, 118 Mass. 541, it was said by Chief Justice Gray: "Unless the decision can be supported upon the ground that the wife acted only as the husband's agent and as a mere conduit for passing the title to the indorsee (as suggested in *Gay v. Kingsley*, 11 Allen, 345), and thus stand as if the name of the wife as indorsee and indorser had been stricken out by the husband before he delivered the bill, leaving it indorsed by him to the subsequent indorsee, it is inconsistent with the earlier and later decisions of this court": See *Foster v. Leach*, 160 Mass. 418.

We are of opinion, therefore, that the instruction requested—⁵²¹ namely, that the notes in suit having been made by a wife payable to the order of her husband, no action could be maintained against her upon them—should have been given, and that the instructions given were wrong.

Exceptions sustained.

HUSBAND AND WIFE.—IF A NOTE IS EXECUTED BY A MARRIED WOMAN payable to the order of her husband, and is indorsed and presented by him, with no implication, representation, or presumption that she is to be benefited in her estate or business, to be drawn from the form of the note or from the fact that she gave it to her husband to be discounted, she is not estopped to deny liability on the note, in the absence of evidence that she intended to be bound thereby, and the fact that she is possessed of a separate estate is not sufficient to estop her: *Note to Trimble v. State*, 57 Am. St. Rep. 178. Compare *Strickland v. Vance*, 99 Ga. 531, 59 Am. St. Rep. 241.

McCARVELL v. SAWYER.

[178 MASSACHUSETTS, 540.]

LANDLORD AND TENANT—LIABILITY OF LANDLORD TO STRANGER FALLING DOWN ELEVATORWAY.—A person is not on premises by invitation where, in response to a question, a tenant tells her if she will go straight ahead she might find out what she wishes to know, and the landlord is under no liability to such person beyond what he would be to every person not a trespasser.

LANDLORD AND TENANT—ELEVATORS.—A PERSON IS NOT EXERCISING DUE CARE where she enters a strange building, walks along a passageway and through an open elevator door, even though she had never seen an elevator before, for an elevator entrance is peculiar and does not suggest an ordinary passageway.

E. H. Savary, for the plaintiff.

C. S. Knowles, for the defendants.

⁵⁴⁰ HOLMES, J. This is an action for personal injuries. The plaintiff, wishing to visit a friend, went to the wrong building, walked along a passageway, walked through a door which she says was open, and fell down an elevator well. The defendants owned and were in control of the passage and the elevator well. The plaintiff had come from the provinces, and never had seen an elevator well before. In view of the argument for the plaintiff, we may add that when she came to the building she asked a man who was standing at the entrance, and who, as it turned out, was one of the tenants of the building, if her friend lived there. He said that he did not know, but that if she would go straight in she might find out for herself. Rulings were asked and refused that the plaintiff was on the premises by invitation, and that on the question of the plaintiff's care the jury might take into account that she never had seen an elevator. The plaintiff excepted.

Of course, there was no invitation. In other words, the disposition of the premises and the relation of the defendants to the ⁵⁴¹ plaintiff imposed upon them no duty or liability beyond what they would owe to every person not a trespasser who might enter their building: *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463. See *Blatt v. McBarron*, 161 Mass. 21, 23, 24, 42 Am. St. Rep. 385. The reply of the tenant to the plaintiff's question did not make her his guest or in any way affect her rights. It was a disinterested suggestion, nothing more.

We need not consider whether the other ruling asked was right as an abstract rule of law when applied to a case like this, since we are of opinion that, however this may be, the plaintiff was not entitled to go to the jury, and therefore cannot complain. The plaintiff, whatever her ignorance, on coming to an ordinary sliding elevator door, such as this was, was not exercising reasonable care to step through the aperture without looking: *Gaffney v. Brown*, 150 Mass. 479; *Blatt v. McBarron*, 161 Mass. 21, 23, 24, 42 Am. St. Rep. 385. It is true that in *Gaffney v. Brown*, 150 Mass. 479, the door was shut; but, on the other hand, an elevator entrance on the face of it is peculiar, and does not suggest an ordinary passageway, even if the door is open, as the plaintiff said was the case.

Exceptions overruled.

ELEVATORS—OPEN AND UNATTENDED.—The owner of a building, who leaves a passenger elevator therein open and unattended, is guilty of negligence, and, if a person enters it and is injured, the owner is answerable, in the absence of contributory neg-

ligence: *Southern etc. Assn. v. Dawson*, 97 Tenn. 367, 56 Am. St. Rep. 804.

ELEVATORS—DUTY OF OWNER TO LICENSEE.—An ordinance providing that dangerous machinery shall be so guarded as to protect employes cannot be extended to give a right of action to a mere licensee who is injured through the negligence of the owner of an elevator in failing to have it properly guarded: *Gibson v. Leonard*, 143 Ill. 182, 36 Am. St. Rep. 376. So one who enters premises by permission only, and uses a freight elevator without inducement or invitation to hoist or lower himself or others, is a mere licensee, and cannot recover from defects in the elevator, or from obstructions, or for falling into the elevator well: Monographic note to *Southern etc. Assn. v. Dawson*, 56 Am. St. Rep. 810.

BICKFORD v. HYDE PARK.

[173 MASSACHUSETTS, 552.]

EMINENT DOMAIN—DAMAGES.—Under a statute allowing all the damages done to a party by reason of sewer improvements, whether any of his property is taken or not, injury to a landowner by draining his well may be recovered for.

Petition to assess the damages caused to petitioner's estate by the construction and maintenance of a common sewer in front thereof. Sewer commissioners had excavated a trench for a sewer pipe in front of the petitioner's premises, in which a public sewer was maintained. There was no entry on the petitioner's land, and no land or property of the petitioner was taken. On petitioner's land was a valuable well, which had been drained and dried by reason of the construction of the sewer, and would remain so. The petitioner sought damages for the drying up of the well.

J. M. B. Churchill, for the petitioner.

J. E. Cotter, for the respondent.

553 LATHROP, J. If we assume in favor of the respondent that the petition cannot be maintained under the Statutes of 1896, chapter 287, section 4, inasmuch as there was no taking of the petitioner's land, we still are of opinion that the petitioner may recover for the injury done to her estate under section 16 of the act referred to. This section is as follows: "The provisions of chapter 50 of the Public Statutes and of acts in amendment thereof, so far as applicable and not inconsistent with this act, shall apply to the town of Hyde Park in carrying out the provisions of this act."

554 Section 3 of the Public Statutes, chapter 50, is as follows: "Damages occasioned by the laying, making, or maintaining of main drains or common sewers, shall be ascertained and recovered in a city, as in the laying out of highways or streets therein; and in towns, as in the laying out of town ways."

To ascertain what damages may be recovered, we must turn to the Public Statutes, chapter 49, section 16, which is as follows: "In estimating the damage sustained by laying out, locating anew, altering, or discontinuing a highway, or by an order for specific repairs, regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner; and there shall be allowed, by way of setoff, the benefit, if any, to the property of the party by reason thereof."

It is well settled that under this and similar statutes, allowing all the damages done to a party, whether any of his property is taken or not, injury to a landowner by draining his well may be recovered for by a petition under the act: *Sheldon v. Boston etc. R. R. Co.*, 172 Mass. 180, and cases cited. See, also, *Penney v. Commonwealth*, 173 Mass. 507, ante, p. 312.

Exceptions sustained.

EMINENT DOMAIN—DAMAGES.—Under a statute providing that compensation shall be made for private property taken or damaged for public use, recovery can be had by a landowner for the drainage of his wells, even though, on the completion of the work for which the land was appropriated, the water returns to the soil as before: *Penney v. Commonwealth*, 173 Mass. 507, ante, p. 312.

COMMONWEALTH v. ST. JOHN.

[173 MASSACHUSETTS, 566.]

CRIMINAL LAW—PROMISE OF IMMUNITY FROM PROSECUTION—WHO CAN MAKE.—The immunity which may be promised from the consequences of crime on condition of a full disclosure and readiness to testify are not a matter of right, but rest in the last resort on the sound judicial discretion of the court having final jurisdiction to sentence, and such a promise made by a police officer, without any authority from the district attorney, to one of two persons accused of a crime, cannot be pleaded in bar of an indictment against him for the crime.

Indictment charging one defendant with unlawfully using a certain instrument in and upon the body of a woman named, with intent to procure a miscarriage, and thereby causing her death, and charging the other defendants with being accessaries.

Two of the defendants pleaded promises of immunity from prosecution made by police officers in bar of the indictment.

W. H. Brooks and W. Hamilton, for the defendants.

C. L. Gardner, district attorney, for the commonwealth.

⁵⁰⁰ MORTON, J. The decisive question in each case is the same, and the cases may, therefore, properly be considered together. The question is, whether the immunity that was promised to the defendants by the city marshal and by Boyle, the chief detective of the police department of Springfield, can be pleaded in bar of the indictment against them. We think that it cannot. The immunity and protection which may be promised from the consequences of crime on condition of a full disclosure and readiness to testify are not a matter of right, but rest in the last resort on the sound judicial discretion of the court having final jurisdiction to sentence, and cannot therefore be pleaded in bar: *Wight v. Rindskopf*, 43 Wis. 344; *State v. Moody*, 69 N. C. 529; *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174; *Rex v. Rudd*, Cowp. 331; *Wharton on Criminal Evidence*, secs. 439, 443; 3 *Russell on Crimes*, 9th Am. ed., 599.

When such promises are made by the public prosecutor or with his authority, the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept. The prosecuting officer has also the power ⁵⁷⁰ to enter a nolle prosequi. It appears in each case that neither the city marshal nor Boyle had any authority from the district attorney to make the promises or hold out the inducements which they did. There is nothing in either bill of exceptions tending to show that the district attorney had anything to do with the prosecution in the police court. Neither of the defendants appeared before the grand jury, although they were at the courthouse from day to day when the grand jury was in session, ready to testify, relying on the promises of immunity made by the city marshal and by Boyle. And there is nothing tending to show that there was any expectation or understanding on the part of the district attorney that either was to testify as a government witness in the superior court, and neither did so testify. If an appeal had been made to the clemency of the court, it would no doubt have been competent for the court to take into consideration the inducements which had been held out and the promises that had been made, if any, by the city marshal and by Boyle. But what was done was to plead the promises and in-

duancements in bar. A question of law was thus presented, and we think that the ruling of the court was clearly right.

Exceptions overruled.

STATE'S EVIDENCE—AGREEMENT TO TURN.—An agreement between a prosecuting officer and an accomplice in crime, that upon the latter testifying against his accomplice the prosecution against him will be discharged, when such agreement is made without the advice or consent of the court, cannot be enforced, and is no bar to prosecution: *State v. Guild*, 149 Mo. 370, post, p. 395, and note there-to. When an accomplice confesses and his testimony is used by the prosecution upon the trial of another defendant, he has an equitable claim to pardon, or the court may enter a nolle prosequi, but he is not entitled to discharge as a matter of right: *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174. Agreements concerning state's evidence are subjects of monographic notes to *Camron v. State*, 40 Am. St. Rep. 767-775; *State v. Lyon*, 31 Am. Rep. 522-523.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

DEERING v. KELSO.

[74 MINNESOTA, 41.]

AGENCY—CHECKS—IMPLIED POWER TO INDORSE.—An agent authorized to collect accounts and receive money and checks payable to his principal has no implied authority to indorse checks in the name of the latter.

H. Steenerson and W. E. Rowe, for the appellant.

Alley & Konzen and W. Watts, for the respondents.

42 **BUCK, J.** The plaintiff is a nonresident corporation, created under the laws of the state of Illinois, and engaged in the manufacture and sale of harvesting machinery and other farm implements. The defendants are copartners and bankers at the village of Hallock, Kittson county. On January 16, 1895, one B. P. Lewis, a collector for the plaintiff, went to the firm of Westerson & Johnson, in Hallock, and received from this firm a bank check for the sum of two hundred dollars, dated on that day, and payable to plaintiff or order, drawn on the defendants, in part payment of a debt then due and owing from said firm to the plaintiff. Lewis, instead of transmitting this check to the plaintiff, residing in the state of Illinois, took the same to the banking-house of the defendants, and then indorsed upon the back of the check the words, "William Deering & Co., by B. P. Lewis" (the name of plaintiff), and received from the defendants, in exchange for said check, a draft payable to himself or order, on Gilman, Son & Co., of New York, for one hundred and ninety-nine dollars and eighty cents, issued by the defendants. Lewis collected the proceeds of the draft and absconded. He

never paid to plaintiff any part of the proceeds so collected, and never made any report to plaintiff of such collection. When the plaintiff was informed of the transaction, it caused a demand to be made on the defendants for the payment ⁴³ to it of the amount of said check so indorsed by Lewis. The defendants refused to pay the same. In the meantime, the defendants charged the account of Westerson & Johnson with the amount of said check, and stamped upon its face that the same had been paid. Upon defendants' refusal to pay the amount of the check, the plaintiff brought this action for the recovery thereof, and upon trial the defendants had a verdict, and, from a judgment entered thereon, the plaintiff appeals to this court.

It quite conclusively appears that Lewis, as collector for the plaintiff, was authorized to make collections in money, or to receive what are commonly called "bank checks," conditioned, however, that they were payable to the order of William Deering & Co.; and, upon the receipt of such checks, it was his duty to send these identical checks forthwith to plaintiff for indorsement and collection, through the clearing-house and other banks. Lewis never had any express authority to indorse or collect the checks after they were received by him; and it is a well-established general rule of commercial law, applicable to all cases of implied agencies, that no authority will be implied from an express authority, unless it is positively needful for the performance of the main duties contemplated by the express authority: Tiedeman on Commercial Paper, sec. 77, and authorities cited; Jackson v. Bank, 92 Tenn. 154, 36 Am. St. Rep. 81.

In this case no such necessity was shown or existed. The check in the possession of Lewis was not payable to him, but to his principal, William Deering & Co.; and no implication arose that prima facie it was payable to Lewis, or that he had authority to demand or secure payment in the name of the true owner. Where the drawer has funds in a bank, it is by custom obliged to honor checks payable to order, and it pays them at its peril to any other than the person to whose order they are made payable: Tiedeman on Commercial Paper, sec. 431. The check was payable to plaintiff, and, when Lewis received it in payment of a debt due his principal, his duty as collector ceased, except to transmit it to his principal. The indorsement of the check was not a necessary incident of the collection of the account, and his power to receive checks, instead of cash, did not confer power to

indorse checks: *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Graham v. United States Sav. Inst.*, 46 Mo. 186.

44 The fact that Lewis was authorized to make collections in money as well as in checks did not enlarge his authority to indorse checks so taken in the name of the principal: *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81. If he took checks in payment, he was not thereby authorized to indorse them to the bank on which they were drawn, and receive the proceeds: 1 *Daniel on Negotiable Instruments*, sec. 294. See *Mechem on Agency*, 382.

We do not think that any custom or usage was proven that plaintiff permitted its collection agents to indorse checks payable to itself, and receive the proceeds; nor do we in any manner intimate that, if such usage or custom was proven, it would be competent evidence to overcome well-established commercial law. It seems a hardship for this loss to fall upon the bank, but it took no steps to inquire by what authority Lewis made the indorsement, and like other litigants who mistake the law, it must necessarily abide the consequences.

Judgment reversed.

AGENCY.—AUTHORITY TO RECEIVE CHECKS in payment of bills in his hands for collection, does not authorize an agent to indorse and collect the checks: *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81.

PENCILLE v. STATE FARMERS' MUTUAL HAIL INSURANCE COMPANY.

[74 MINNESOTA, 67.]

CORPORATIONS—RIGHT OF MEMBERS TO MAINTAIN SUITS AGAINST.—The rule that a corporation, by its officers, is the proper party to maintain an action to protect its property and maintain its rights, and that, until the corporation refuses, or is unable, individuals have no right to litigate for it, has no application when the officers of the corporation are engaged in perpetrating a fraud upon its members and grossly mismanaging its affairs. In such case, individual members may maintain an action against the corporation and its officers.

EQUITY—RIGHT OF ONE TO ACT FOR MANY.—If the questions to be litigated are of common interest to a large number of persons, and it is impracticable to bring them all into court, one or more may proceed in equity for the benefit of all.

INSURANCE—MUTUAL COMPANIES—LIMIT TO ASSESSMENTS.—The reasonable limits of an assessment in a mutual insurance company upon policy-holders to meet losses must not be

disregarded, or the officers of the company making such assessment will be condemned as having transcended their authority, and the assessment held illegal and invalid. Such officers must act judiciously, as well as honestly, when levying assessments, and, if they fail to do so, the courts may interfere in behalf of the injured parties.

J. Moonan, for the appellants.

C. C. Willson, for the respondents.

⁶⁹ COLLINS, J. Appeal from an order overruling a demurrer to a complaint, the grounds stated being that the plaintiffs had not legal capacity to sue, that there was a defect of parties plaintiff, and that facts sufficient to constitute a cause of action were not stated.

The plaintiffs, sixteen in number, are policy-holders in a mutual hail insurance company organized in this state, and brought the action in behalf of themselves and all other policy-holders who might choose to come into the proceeding. The defendants are the company and its officers. The complaint contains a large number of allegations of misbehavior on the part of defendants, but, simply stated, the charge is that the officers of defendant company have grossly mismanaged its affairs, and for their own aggrandizement have entered upon a deliberate system of official misconduct, which will cause great injustice to all policy-holders and will ruin the company itself. The purpose of the action is to stop this alleged bad behavior, and especially to restrain the officers from proceeding to collect an assessment of some fifty-six thousand dollars, said to have been levied on the plaintiffs and all other policy-holders by the ⁷⁰ board of directors illegally, unjustly, and without any necessity therefor.

1. The complaint shows that plaintiffs are policy-holders in defendant insurance company, organized by the individuals named as defendants, and others, upon the mutual plan, and that there are no stockholders; and it also shows that defendant company, through its officers, has pretended to levy this assessment against all of its policy-holders, as members of the organization. It is evident that plaintiffs and all other policy-holders, some three thousand five hundred in number, are members of the organization, against whom the board of directors may make annual assessments to cover losses, not to exceed four per centum of the amount of indemnity carried; and, according to the allegations, the misconduct complained of is the premeditated and deliberate act of the defendant officers. While it is well settled that a corporation, by its officers, is the proper party to main-

tain an action to protect its property and enforce its rights, and that until the corporation refuses, or until it is unable, individual members have no right to litigate for it, the rule is of no force here; for the showing is that the officials of defendant company, upon whose good conduct plaintiffs and other policy-holders have a right to rely, are engaged in perpetrating the fraud complained of. To hold that policy-holders have to appeal to these officials to institute proceedings to right their own unjust acts would be mere mockery.

2. It was unnecessary for all of the aggrieved policy-holders to participate in this action as plaintiffs, or, upon their refusal, to make them defendants. If it were, we should have over three thousand five hundred persons as parties to this proceeding—a most impracticable thing. Who shall be made parties to an action of this nature is more a question of convenience and discretion than of absolute right, and is to be determined according to the exigencies of the particular case. When questions to be litigated are of common interest to a large number of persons, and it is impracticable to bring them all into court, one or more may proceed in equity for the benefit of all. If any other rule prevailed, it would ordinarily operate to prevent a remedy.

3. The chief point made by defendants' counsel, as against the ⁷¹ complaint, is that it fails to state facts constituting a cause of action. It is possible that the complaint contains much which should have been omitted, but, if so, the demurrer is of no value. It charges several specific acts of gross misconduct on the part of the defendant officers—the borrowing of money when not needed for any legitimate purpose, and the expenditure of money in an unauthorized manner and for illegitimate purposes. It alleges that in 1897, while the plaintiffs were policy-holders, the company had a membership of three thousand five hundred and four—each policy being for five years, and the total amount of insurance amounting to more than one million four hundred thousand dollars—and that its total losses, adjusted and unadjusted, amounted to less than twenty-one thousand dollars; that it had on hand at the beginning of the year over two thousand dollars; that it had received, as a policy and agent's fee, the sum of two dollars from each member; that notwithstanding this condition of affairs the board of directors did, about October 1st of that year, unlawfully, illegally, and unnecessarily proceed to levy an assessment of four per cent (the maximum percentage allowed) upon each dollar of the amount of insurance held by each member.

A mere computation shows that through this action the board levied an assessment in the aggregate of fifty-six thousand dollars to meet losses less than twenty-one thousand dollars in amount. It was for nearly three times the amount of losses. It was practically one hundred and seventy per cent more than the amount lost. If the correct figures are given, it was confiscation of the most objectionable kind. We must take into consideration, when regulating such assessments, the patent fact that all of the members will not pay, necessitating a loss which must be provided for. But there can be no justification in levying an assessment amounting to fifty-six thousand dollars in the aggregate, when the losses to be liquidated are less than twenty-one thousand dollars. It is a gross fraud upon its face.

The reasonable limits of an assessment upon policy holders to meet losses incurred by the company must not be disregarded, or the officers making such an assessment will be condemned as having transcended their authority, and the assessment will be held illegal and invalid. In fixing the amount, reasonable allowances may be made for probable failures in collections and the expense of making collections. But the amount of such allowances must not be unreasonable: See *Rosenberger v. Washington etc. Ins. Co.*, 87 Pa. St 207; *Farmers' etc. Ins. Co. v. Knight*, 162 Ill. 470; *York County etc. Ins. Co. v. Bowden*, 57 Me. 286. An assessment levied is not valid simply because it has been made. It must be necessary. The liability of the policy-holder is not absolute, but is conditional, depending upon the incurring of legitimate expenses to which the holder agreed to contribute when he became a member. The officers of a mutual company must act judiciously, as well as honestly, when levying assessments; and, if they fail so to do, the courts will interfere in behalf of the injured parties. At least one good cause of action was stated in the complaint, and that is sufficient.

Order affirmed.

CORPORATIONS—SUITS AGAINST BY MEMBERS.—Ordinarily, redress for wrong to corporate rights or property must be sought in the name of the corporation, and a stockholder cannot sue individually, unless the corporate authorities refuse to act; but when the wrongdoers are the managers and majority of the stockholders, who have diverted the corporation and its assets from their legitimate purposes to the private use and benefit of one of such majority, a minority stockholder may sue without application to have suit brought in the name of the corporation: *Rothwell v. Robinson*, 39 Minn. 1, 12 Am. St. Rep. 608; *Wallace v. Lincoln Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

IN EQUITY, ONE OR MORE STOCKHOLDERS MAY SUE in behalf of themselves and others similarly situated, when, upon ap-

plication to the corporation, it refuses to sue for a breach of trust by directors, causing a waste or misapplication of funds: Note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 646. In cases of unincorporated associations of large membership, suits may be brought by some of the members in their own names in behalf of, or as representing, all: *Liederkrantz v. Germania*, 163 Pa. St. 265, 43 Am. St. Rep. 798.

INSURANCE.—ASSESSMENTS BY MUTUAL INSURANCE COMPANIES ARE LIMITED by the amount of the losses sustained and unpaid at the time of making the assessments, and, if beyond that, an action will not lie upon the premium notes: Note to *Pacific Mut. Ins. Co. v. Guse*, 8 Am. Rep. 135; and a payment of excessive assessments by the insured does not waive his right to refuse to pay subsequent excessive assessments: Note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 573.

TREBBY v. TRANSCRIPT PUBLISHING COMPANY.

[74 MINNESOTA, 84.]

LIBEL—MATTER PER SE LIBELOUS.—A written publication characterizing one as a "disreputable person," and charging him with having maliciously published in a newspaper a known false report tending to injure the credit of the city in which he lives, is libelous per se, unless privileged or justified, and the jury must be so instructed.

LIBEL.—PRIVILEGED COMMUNICATIONS ARE those made in good faith upon any subject matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, and which contains matter which but for the occasion upon which it is made, would be defamatory and actionable.

LIBEL.—NEWSPAPER PUBLICATIONS of false and defamatory matter are not privileged merely because made in good faith as a matter of news.

LIBEL.—PRIVILEGED COMMUNICATIONS.—The publication in a newspaper of a nonofficial resolution of a city council, wholly outside the scope of its duty, and containing matter libelous per se, is not privileged, either absolutely or conditionally.

G. W. Stewart and D. T. Calhoun, for the appellant.

Lindbergh, Blanchard & Lindbergh, for the respondent.

87 MITCHELL, J. This was an action for libel. The trial resulted in a verdict for the defendant, and the plaintiff appealed from an order denying his motion for a new trial, made on the grounds: 1. That the verdict was not justified by the evidence; and 2. Errors in law occurring on the trial, and duly excepted to.

The facts leading up to the publication of the alleged libel were as follows: The city of Little Falls had issued to a water power company its bonds to the amount of twenty-five thousand dollars in aid of the improvement of the water power of the Mississippi river at this place, whereupon the plaintiff brought an action to restrain the city treasurer from paying the bonds, and to compel the water power company to return them, on the ground that they were illegally issued and void. To the complaint in the action the water power company demurred, on the ground that it did not state a cause of action. The demurrer was overruled, and from the order overruling it the water power company appealed to this court. The bonds having been subsequently surrendered and canceled under some new agreement between the city and the water power company, this appeal was not prosecuted further, and was finally dismissed by this court for want of prosecution, and judgment for costs rendered against the water power company. Thereupon, the plaintiff caused to be published in a St. Paul paper an article to the effect that the judgment of this court in relation to the bonds was in favor of the plaintiff; that the amount in controversy was twenty-five thousand dollars; that this decision rendered the bonds void; that the case had been in contest for some time, and was quite important.

This article having come to the notice of some bankers and brokers in Chicago, they wrote to the mayor of the city, asking for the particulars, and inquiring if the city had started on an era of repudiation, and why the bonds were contested. Thereupon some of the citizens of Little Falls presented a petition to the city council, reciting the facts, and stating that they deemed that the city had been slandered by the publication of the article, and that ^{ss} action should be taken "to make the truth public, so that the good name of the city should be continued." Thereupon the city council passed the resolution set out in the complaint, in which they characterized the plaintiff as a "disreputable person," and recited that the facts were falsely reported by him to the St. Paul paper with full knowledge of the true facts, that he maliciously and intentionally made a false report, and condemned his conduct as execrable and odious, and as having caused the city irreparable damage. This resolution, preceded by an historical introduction, and headed "The City's Credit" (also set out in the complaint), the defendant published in its newspaper, published in the city of Little Falls and circu-

lated in that city and the surrounding country. This is the publication complained of.

1. We shall spend no time on the question whether this publication was libelous on its face. It was clearly calculated to injure plaintiff in the good opinion and respect of others, and expose him to the contempt and hatred of his neighbors, especially in the city of Little Falls. It was manifestly libelous, unless privileged: *Holston v. Boyle*, 46 Minn. 432; *Dressel v. Shipman*, 57 Minn. 23; *Wilkes v. Shields*, 62 Minn. 426; *Byram v. Aiken*, 65 Minn. 87; *Peterson v. Western Union Tel. Co.*, 65 Minn. 18. The court left it to the jury to determine whether or not the publication was libelous. This was reversible error, unless rendered harmless by other facts in the case. The court ought to have instructed the jury, as a matter of law, that the publication was libelous *per se*: *Smith v. Stewart*, 41 Minn. 7; *Sharpe v. Larson*, 67 Minn. 428.

2 Defendant contends that the publication was absolutely privileged, because its paper was the official newspaper of the city, and the city charter (Special Laws 1889, c. 8, sec. 52) required all ordinances and resolutions to be published in the official newspaper before they shall be in force. To this there are several answers: 1. The provision of the charter invoked does not seem to apply to resolutions of this character, but merely to ordinances which will have some operative force after they are passed; 2. This does not purport to be an official publication, but merely the publication ⁸⁹ of an item of news; and 3. The resolution was not within the scope of the duty of the city council, but wholly outside of it, and privilege can only be claimed of things published within the scope of official authority. The city council had no more authority to libel or traduce the private character of a private citizen than an assemblage of private citizens would have: *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 853; *Wilcox v. Moore*, 69 Minn. 49.

Neither was the publication privileged conditionally. A privileged communication is one made in good faith upon any subject matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable: *Newell on Defamation*, 388. If the article published by the plaintiff in the St. Paul paper was calculated unjustly to impair the credit of the city, the city council or the defendant would have a perfect

right to publish the actual facts, in order to set the city's credit right before the public, although such facts might reflect on the conduct of the plaintiff, but not to make false and defamatory statements regarding plaintiff's character: *Landon v. Watkins*, 61 Minn. 137.

It is true that the publication complained of was, as a matter of news, entirely true; that is, the city council did pass the resolution just as stated by the defendant. But the publication in a newspaper of false and defamatory matter is not privileged because made in good faith as a matter of news. The right to publish through the newspaper press such matters of interest as may be thus properly laid before the public does not go to the extent of allowing the publication concerning a person of false and defamatory matter, there being no other reason or justification for doing so than merely the purpose of publishing news: *Mallory v. Pioneer Press Co.*, 34 Minn. 521. The article was not privileged, either absolutely or conditionally.

3. The defendant further contends that it had conclusively established a justification. The answer contained no plea of justification, and we find nothing in the record warranting the conclusion ⁹⁰ that any such issue was tried by consent of parties; although the court seems to have submitted to the jury, under the exception of the defendant, the question whether the publication was true or false. But, waiving that question, the evidence certainly did not conclusively establish a justification. It is elementary that a justification must be as broad as the libel. Conceding that the evidence was conclusive that the article published by the plaintiff in the St. Paul paper was untrue in some of its statements, it was not conclusive that plaintiff was a disreputable person, and that he maliciously published a false report, knowing it to be false. Therefore we find nothing in the record which remedies the error of the court in submitting to the jury the question whether the publication was defamatory and libelous on its face.

Order reversed and new trial granted.

LIBEL.—MATTER ACTIONABLE PER SE.—A written or printed publication which tends to degrade or disgrace the person about whom it is written or printed, or which tends to render him odious, ridiculous, or contemptible in the estimation of his friends or acquaintances or the public, is actionable per se as libelous. Accordingly, the publication of a card in a newspaper, charging a person with uttering a falsehood, is libelous per se: *Riley v. Lee*, 88 Ky. 603, 21 Am. St. Rep. 358.

LIBEL.—PRIVILEGED COMMUNICATIONS.—A communication made in good faith upon any subject in which the party communi-

ating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding duty or interest: *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863; note to *Bearce v. Bass*, 54 Am. St. Rep. 454; *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. Rep. 170.

LIBEL—PRIVILEGED COMMUNICATION.—The publication of the proceedings of a city council, including the remarks of a person in attendance, if libelous, is not privileged, unless made by one in the performance of a duty to another to whom he owes the duty, or unless made by one who is interested in the subject to another having a corresponding interest: *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 853.

LIBEL—NEWSPAPER PUBLICATIONS.—An advertisement proclaiming the defamation of a person's character, and averred to have been published without malice as a matter of news, is not the subject of lawful advertisement unless proved to be true, and, in the absence of such proof, the publisher must answer in damages: *Riley v. Lee*, 88 Ky. 603, 21 Am. St. Rep. 358. Newspaper libel is discussed in extended notes to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369; *Aldrich v. Press Printing Co.*, 86 Am. Dec. 89-93.

WHITE v. SANDERSON.

[74 MINNESOTA, 118.]

ELECTIONS—NOMINATION OF CANDIDATES—POWER OF CONVENTION TO DELEGATE NOMINATION TO COMMITTEE.—A political convention may delegate its power, and confer upon a designated committee authority to nominate a candidate for office, who, when so nominated, is entitled to file a certificate of nomination in accordance with the election law, and, upon paying the prescribed fee, to have his name placed upon the official ballot and to be voted for as the regular nominee of the party represented by such convention. In such case, the certificate of nomination may be executed by the chairman and secretary of the nominating committee.

T. Spillane, for the petitioner.

Callaghan & Granger, for the respondent.

119 COLLINS, J. The facts herein are undisputed. A duly constituted and organized delegate convention representing the Democratic party of Olmsted county, was held October 8, 1898, for the purpose of nominating candidates for the various county offices to be voted for at the ensuing election, including a candidate for the office of judge of probate. No nomination was made for this office, but the convention properly adopted a resolution whereby, in accordance with party usage and custom, it authorized the Democratic county committee for said county

to nominate a candidate for the said office. October 15th, after said convention had adjourned without day, the duly appointed members of the Democratic committee for said county met, and organized by the selection of a chairman and secretary, and then duly nominated the said petitioner, White, as the Democratic candidate for said office. And thereupon the chairman and secretary of said committee duly executed a certificate ¹²⁰ of such nomination, which was duly tendered to said respondent county auditor, together with the fees by law required with a demand that he file the same in his office, and place the petitioner's name on the official ballot about to be printed for use in said county at the approaching November election. The respondent refused to receive said certificate or the fees, or to file the former, and refused to place said name on the ballot. This is a proceeding, under the General Statutes of 1849, section 48, to compel him so to do.

The questions are: 1. Can a county convention delegate its power, and confer upon a committee the authority to nominate a candidate for office, who, when so nominated, will be entitled to file a certificate of nomination in accordance with the provisions of the General Statutes of 1894, sections 36-38, and, upon paying the prescribed fee, to have his name placed on the official ballot as the regular nominee of the party represented by the convention? 2. If it can, should the certificate of nomination be executed by the presiding officer and secretary of the convention, or by the chairman and secretary of the committee?

We are clearly of the opinion that, if such a proceeding is in accordance with party usage and custom, a convention can delegate its power and authority to make nominations to a committee duly selected or designated for that purpose. And we are also of the opinion that, when a nomination is made in this manner, a certificate thereof executed, in form, by the chairman and secretary of the committee, is all that is required, under the law: Gen. Stats. 1894, sec. 38. In the case of *Manston v. McIntosh*, 58 Minn. 525, it was said that in this election law (Laws 1893, c. 4) there is a total absence of anything which indicates that the legislature intended to regulate the manner in which political parties should proceed to organize conventions, or in making nominations. It was also said that it was not the purpose of the legislature to suppress and prevent well-known usages and practices in regard to political conventions. And it was held that nominations might be made at mass conventions, the members of which had not been elected as delegates at primaries

or caucuses. The law was interpreted in this respect in accordance with what seemed to be its spirit and intent, and not strictly or technically. In the very recent case of *Phillips v. Gallagher*, ¹²¹ 73 Minn. 528, it was stated that a political convention has control over its own proceedings and officers, in the absence of statutory regulations, and may proceed according to party usages and customs. The convention in question was not prohibited by any statute from conferring its right to nominate upon the county committee, and it stands admitted that this method of naming a candidate is in accordance with party usage and custom. In fact, this practice of referring nominations to committees composed of members of the convention, or organized for campaign purposes, with power to act until another convention is held and another committee is selected, is a matter of common knowledge. We are not to suppose that the legislature intended to prohibit the well-known methods of procedure, in the absence of any reference to them. The statute in Montana is substantially the same as our own in reference to nominations, and in 1893 it was there held by the supreme court that under their statute a political convention had power to delegate its authority to nominate to a committee, and that such a nomination, made after the convention adjourned, was in effect the act of the convention itself, and therefore valid: *State v. Benton*, 13 Mont. 306. It was well stated in the opinion that if the power and authority to nominate were conferred upon a committee by the convention, and before its adjournment a nomination was reported, acted upon, and ratified, no one would contend that the nomination was not the act of such convention. And then the court, at page 326, proceeded: "Such supposititious case differs from the facts in the case before us in only one particular: Instead of the convention ratifying the act of the committee after it was done, as above illustrated, it, in the actual case before us, ratified the act of the committee in advance, and did so expressly."

When the convention in question here delegated to the county committee its right and authority to make a nomination for the office of judge of probate, it approved and ratified in advance, and in express terms, the nomination subsequently made. A nomination so made must be deemed to be the act of the convention itself. As before stated, the certificate may be executed by the ¹²² chairman, who is the presiding officer and the secretary of the committee. The presiding officer and secretary of the convention would have no actual knowledge of the action

of the committee, unless they happened to be members of that body, and therefore, under ordinary circumstances, unable to verify the nominating certificate as by law required. To hold that this document must be executed by the officers of the convention would practically nullify our interpretation of the statute as to nominations made by a committee. Again, this view of the proper method of certifying where a committee nominates is in line with the provision (section 45) respecting the certificate where a vacancy occurring after a nomination has been filled by a committee. Such certificate is executed by the chairman and secretary of the committee naming the candidate. As a formal order has heretofore been entered, directing that the motion to dismiss be denied, and that the order to show cause be made absolute, nothing more remains to be done.

ELECTIONS—CONTESTS OF.—Statutes relating to contested elections should be liberally construed by the courts, so that the rights of the people may be preserved and that no protection be afforded to fraud: *Whitney v. Blackburn*, 17 Or. 564, 11 Am. St. Rep. 857. Mere irregularities in the conduct of an election which deprive no voter of his rights, nor admits a disqualified person to vote, nor casts any uncertainty on the result, and which has not been occasioned by one seeking to profit by it, will be overlooked: *Note to Parvin v. Wimberg*, 30 Am. St. Rep. 265.

SCHOOL DISTRICT No. 10 v. PETERSON.

[74 MINNESOTA, 122.]

TRUSTS—JUDGMENT LIENS.—If the title to land appears of record in the name of a judgment debtor, who in fact never had any interest therein, but the whole equitable title thereto is vested, by reason of a resulting trust, in a third party, the registry law placing judgment creditors, as against unrecorded conveyances, on the same basis as bona fide purchasers, has no application, and the judgment is not a lien on the land.

Eckman & Stevenson, for the appellant.

R. R. Briggs, for the respondent.

124 START, C. J. The plaintiff is a corporation organized under the laws of the state relating to school districts. In March, 1890, Henry Nolan was its treasurer, and had converted to his own use eight hundred and forty-three dollars of its money. Thereafter, and prior to March 18, 1890, the defendant Jasper Daniels succeeded Nolan as the treasurer of the

plaintiff. Thereupon, and on the day last named, Adele C. Nolan assigned a second mortgage on the land described in the complaint, and the note for nine hundred dollars secured thereby, to Daniels, to secure the plaintiff's claim against Henry Nolan on account of such deficit. The prior ¹²⁵ mortgage on the land for four hundred dollars and interest was duly foreclosed, and the land sold to E. F. Jewell on May 26, 1894, for four hundred and eighty-eight dollars and forty cents. On May 27, 1895, the defendant Daniels, who was still such treasurer, by virtue of the mortgage so assigned to him, duly redeemed the land from the foreclosure sale, using for that purpose the money of the plaintiff then in his hands as its treasurer. A certificate of redemption in due form was executed and delivered by the sheriff to Daniels personally. The mortgages, the assignment, and certificate were all duly recorded, and the record title to the land, on and after such redemption, was in the name of Daniels. The mortgage to secure the plaintiff was taken in the name of Daniels, and the redemption from the first mortgage was made by him with the plaintiff's money, at the instance and with the knowledge of the other members of the school board of the plaintiff.

On July 13, 1895, a judgment for forty-one dollars and fifty-five cents in favor of John Bergman and against Daniels was duly docketed in the county of St. Louis, wherein the land is situated. Bergman duly assigned this judgment on July 27, 1895, to S. H. Eckman and W. J. Stevenson, who paid a valuable consideration therefor. The assignees of the judgment issued execution thereon, and levied upon the land, which was duly sold on April 4, 1896, pursuant to the judgment, execution, and levy, to the defendant Peterson for seventy-four dollars and fourteen cents, to whom the sheriff executed the usual certificate of sale, and returned the execution fully satisfied. Neither the judgment creditor nor his assignees had any notice that the plaintiff had any interest in the land until the levy was made, and the assignees purchased and paid for the judgment in reliance upon the record title. The defendant Peterson had no notice of the claim of the plaintiff to the land until after he had purchased it at the execution sale. He paid no money on such sale, but promised to pay to the assignees of the judgment the amount of his bid on demand, which he has not done. He acted in the purchase at such execution sale for and on behalf of the assignees. No redemption was ever made from this execution sale.

Upon the foregoing facts found by the trial court, its conclusions of law were that Daniels held the land in trust for the plaintiff, ¹²⁶ and never had any interest therein except the record title, that the judgment was not a lien thereon, that Peterson acquired no title under the execution sale, and that the plaintiff is the owner of the land; and directed judgment accordingly. It was so entered, and the defendant Peterson appealed from the judgment.

The record presents two questions only for our consideration:

1. Do the facts found establish an implied or resulting trust in the land in favor of the plaintiff? 2. If so, can the trust be enforced as against the purchaser at the execution sale?

1. Did Daniels hold the land, after he acquired the legal title by his redemption from the foreclosure sale under the first mortgage, in trust for the plaintiff? The statute (Gen. Stats. 1894, sec. 4280) abolishes resulting trusts where a grant is made to one person upon a consideration paid by another; but section 4282 of the General Statutes of 1894 provides that this statute "shall not extend to cases where the alienee named in the conveyance has taken the same as an absolute conveyance in his own name, without the knowledge or consent of the person paying the consideration, or when such alienee in violation of some trust has purchased the lands so conveyed with moneys belonging to another person."

Now, the money of the school district was in Daniels' hands in trust for it, and, if he acquired the legal title to the land in question with its money in violation of the trust, he never in fact had any interest in the land, but held it in trust for the district. If it be conceded that the district could not lawfully acquire and hold real estate except for school purposes, still this would be no reason why a court of equity would not declare that Daniels held the land in trust for the district, in place of the money he had used to acquire it, in violation of his trust, and convert the land by sale into money, and thereby right the wrong, as far as possible, growing out of such violation of the original trust. If he acquired the land with the money of the district, in violation of his trust, he cannot be heard to say, for the purpose of defeating the equitable rights of the district, that it could not have acquired the legal title in the first instance.

¹²⁷ The question whether the school district, by its board of trustees, might have taken an assignment in its own name of the mortgage to secure the deficit of Nolan, and redeem from the

foreclosure sale under the prior lien, using for that purpose the money of the district, is wholly immaterial, for the fact remains that it made no attempt to do so. The only finding of the trial court as to any authority on the part of Daniels to take the money of the district, and acquire personally the legal title to the land by redemption, is to the effect that such redemption was made by him at the instance and with the knowledge of the other members of the school board. Neither the other members of the board nor the board itself could give him any authority to use the funds of the district so to acquire the land or consent thereto. All land and other property of school districts must be held in its corporate name: Gen. Stats. 1894, sec. 3651.

The act of Daniels in so using the money of the district being without any authority, and without the consent of the district, his act was a violation of his trust, and a trust in the land in favor of the district resulted.

2. Was the trust defeated by the title acquired under the judgment and execution sale against Daniels? We answer the question in the negative. It may be conceded that if the execution creditors had purchased the land at the sale in payment and discharge of their judgment, without notice of the equitable title of the school district, they would have been bona fide purchasers, within the meaning of the General Statutes of 1894, section 4283, which provides: "No implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration and without notice of such trust."

But the findings of fact in this case show that neither the execution creditors, nor Peterson, in whose name the land was purchased for them, were purchasers for value and without notice of the trust. The latter never paid anything on his bid, and the former, at the time of the levy upon the land under the execution and before the sale, had notice of the trust. As mere judgment creditors, they are not within the protection of section 4283, the original of which ¹²⁸ is the Revised Statutes of 1851, chapter 44, section 10. The words of the statute, "a purchaser for a valuable consideration," mean now just what they did when the statute was first enacted, as it has never been amended. That they did not then include judgment creditors is clear, for at that time such creditors were not within the registry laws, and the rights of such creditors were in all respects as they were at common law; that is, such as the judg-

ment debtor had: *Greenleaf v. Edes*, 2 Minn. 226 (264); *Banning v. Edes*, 6 Minn. 270 (402). It was not until 1858 that judgment creditors were placed upon the same footing as bona fide purchasers for value as against all unrecorded instruments: Pub. Stats. 1858, c. 35, sec. 54. It is significant that when the registry act was so amended there was no corresponding amendment of the original of section 4283, so as to place judgment creditors on the same footing as purchasers for value without notice, as against trusts in land which arise solely by operation of law, and necessarily cannot be made a matter of record.

It is claimed, however, on behalf of the defendants, that the registry law, as amended and construed by this court, places judgment creditors on the same basis as bona fide purchasers, as against such trusts. Such is not the language of the statute, and it has never been so construed by this court. The registry law (Gen. Stats. 1894, sec. 4180), so far as here material, is in these words: "Every conveyance by deed, mortgage, or otherwise, of real estate . . . not so recorded, shall be void . . . as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record prior to the recording of such conveyance."

The meaning of this statute is not doubtful. It simply places attachment and judgment creditors on a footing with bona fide purchasers, as against every unrecorded conveyance by deed, mortgage, or otherwise, and makes it void as against any attachment or judgment against the person in whose name the title to the land appears of record. But it does not amend, by implication or otherwise, section 4283, so as to bring such creditors within its provisions, and thereby protect them against the equitable title of a third person accruing by operation of law as a resulting trust, which ¹²⁹ cannot be evidenced by a written instrument of any kind, recorded or unrecorded. As to such trusts, an attachment or judgment creditor remains as at common law, standing in the shoes of his judgment debtor. It is only where the judgment debtor in whose name the legal title to land appears of record has, or at some time did have, a beneficial interest therein, that a judgment against him by virtue of the registry law becomes a lien on the land appearing of record in his name, in favor of a judgment creditor without notice. In such a case, his interest in the land can only be transferred by contract of some kind—that is, by deed, mortgage, or otherwise—and, if the record does not disclose the true

title, it is because such contract is not, as it ought to be, a matter of record.

It is with reference to such cases that this court has, in the cases cited and relied on by defendant's counsel, declared, in effect, that the registry act places judgment creditors upon the same footing as bona fide purchasers, and allows their liens to attach to the lands of their debtors according to the title as it appears of record, and not as it exists in fact. Thus, in the case of *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259, it was correctly held that the equitable right to have the description of the land in a deed reformed would not displace the lien of a judgment, because in that case the judgment debtor was the actual owner of the land before the deed was made, and the equity grew out of the contract of the parties, and the judgment took precedence over the unrecorded contract. So with the other cases cited. They are all cases where the judgment debtor, at some time while the title to the land appeared of record in his name, had an actual interest therein.

Our conclusion is that where, as in this case, the title to land appears of record in the name of a judgment debtor who in fact never had any interest therein, but the whole equitable title thereto is vested, by reason of a resulting trust, in a third party, the registry law, placing judgment creditors, as against unrecorded conveyances, on the same basis as bona fide purchasers, has no application, and the judgment is not a lien on the land.

Judgment affirmed.

JUDGMENT LIEN—EXTENT OF.—Although the legal title to real estate is in the name of the judgment creditor, the lien of a judgment against him attaches only to the actual interest he has in the real estate: *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567. A judgment lien extends to only such estate in the real property of the judgment creditor as he could sell or dispose of at the time it attached: *Bruce v. Nicholson*, 109 N. C. 202, 26 Am. St. Rep. 562. The lien of a judgment creditor upon lands of his debtor is subject to all equities existing against such lands at the time of the recovery of the judgment: *Leonard v. Broughton*, 120 Ind. 536, 16 Am. St. Rep. 347. In some states this rule is qualified by registration laws: *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608. The holder of a judgment lien upon real property is not a purchaser, and is not protected as a purchaser under the registry laws of Iowa: *Seevers v. Delashmutt*, 11 Iowa, 174, 77 Am. Dec. 139.

JUDGMENT LIEN.—RESULTING TRUSTS are not subject to the registration laws of Texas, and will be protected against the lien of a judgment creditor, or his assignees, without notice of the trust: *Note to Blankenship v. Douglas*, 82 Am. Dec. 613.

HUGHES v. OLSON.

[74 MINNESOTA, 237.]

MORTGAGES—FORECLOSURE—RIGHT OF PURCHASER TO ENJOIN REDEMPTION UNDER VOID JUDGMENT.—A purchaser at a mortgage foreclosure sale has the right to enjoin a person from redeeming from such sale under a void judgment purporting to have been rendered in his favor against the mortgagor.

JUDICIAL SALES—REDEMPTION — RIGHT TO RESIST. A purchaser at a mortgage foreclosure sale has the right to acquire absolute title to the land, unless it is redeemed within the time allowed by law, by one who has a right under the statute to redeem, and he cannot be deprived of this right by one who is not a lawful redemptioner.

T. F. Young, for the appellant.

Foland & McCune, for the respondents.

238 MITCHELL, J. The plaintiff, the purchaser at a mortgage foreclosure sale, brought this action to enjoin the defendants from redeeming from the sale under a void judgment purporting to have been rendered in their favor against the mortgagor. If the allegations of the complaint are true, the pretended judgment is absolutely void for want of jurisdiction of the person against whom it was rendered. The trial court ordered judgment on the pleadings in favor of the defendants. This must have been done on the ground that the complaint did not state a cause of action.

239 The judge filed no memorandum stating wherein the complaint was insufficient, and the only reasons urged by counsel in support of the ruling of the court are: 1. That even if the judgment under which defendants propose to redeem is void, the plaintiff will not be injured by the redemption, because he will get back his purchase money and interest; and 2. The plaintiff being a stranger to the judgment, he has no right to attack it. The first of these contentions is based upon what was said in *Bovey etc. Lumber Co. v. Tucker*, 48 Minn. 223. Some language was used in the opinion in that case which, if detached from the context, and read without reference to the facts to which it was applied, might seem to sustain the contention. It is not true that the only right of a purchaser at a mortgage sale is to receive back his purchase money and interest. He has the right to acquire absolute title to the land, unless it is redeemed within the time allowed by law by one who has a right under the statute to redeem; and he cannot be

deprived of this right by one who is not a lawful redemptioner. If the law was otherwise, anybody and everybody might redeem without the purchaser being able to question their right to do so: *New England etc. Ins. Co. v. Capehart*, 63 Minn. 120.

2. This void judgment, if given credit and effect, would prejudice the plaintiff in regard to his rights under his purchase at the foreclosure sale. Therefore he has a right to attack it, according to the very authorities cited by the respondents: *Freeman on Judgments*, sec. 335. He is not attacking it for the benefit of the judgment debtor, as counsel seem to assume, but for his own benefit, in order to prevent an unauthorized redemption.

Order reversed.

MORTGAGES—FORECLOSURE.—A PURCHASER at a foreclosure sale succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; in other words, the mortgage ripens into a perfect title through the process of foreclosure: *Hokanson v. Gunderson*, 54 Minn. 499, 40 Am. St. Rep. 354.

VOID JUDGMENTS.—EQUITY WILL ENJOIN THE ENFORCEMENT OF a void judgment if a party has no remedy at law: *Note to Given's Appeal*, 6 Am. St. Rep. 799. A concurrent legal remedy is not always sufficient ground for refusing to enjoin a void judgment: *Note to Peet v. Chicago etc. Ry. Co.*, 91 Am. Dec. 452.

DULUTH CLUB v. MACDONALD.

[74 MINNESOTA, 254.]

CORPORATIONS—IMPLIED POWER TO LEVY ASSESSMENTS.—A corporation has no inherent power to assess for its own use a sum of money on the corporators, and compel them to pay it. Such power is derived only from an express promise, or from statute.

H. T. Abbott, for the appellant.

McGiffert & Hunter, for the respondent.

254 BUCK, J. This action is brought to enforce and collect two assessments levied against the defendant as a member of the Duluth Club, a corporation created and organized under and by virtue of the laws **255** of this state. The club was organized for social purposes, and in its articles of incorporation the purpose is specified as follows: "The name of this cor-

poration shall be the Duluth Club, and the general object and business of said corporation shall be to promote social intercourse among its members, and to provide for them the convenience of a clubhouse."

After the club was organized it purchased a building, obtained a ground lease, and, in order to make the building suitable for a clubhouse and furnish the same, it incurred the debts for which the two assessments above referred to were made and levied. Each member had an equal interest in the clubhouse and its furnishings. No stock was provided for, or issued by, the corporation, and in 1895 it became insolvent, and unable to pay its debts from the dues received from its members, and, in order to pay off its outstanding obligations, a meeting was called for the purpose set forth in the complaint, and at said meeting, held October 15, 1895, each member was, by a unanimous vote of said club, assessed ten dollars, half thereof payable November 1, 1895, and the other half December 1, 1895; provided, however, that any member furnishing a new member to the corporation previous to January, 1896, should be deemed to have paid said assessment. Subsequently, on February 3, 1896, the club had a meeting, and voted to go into voluntary liquidation, and authorized the directors to dispose of the effects of the club, and, if the consideration received was insufficient to pay its debts, the directors were further authorized to make such further assessment on the members pro rata as should be necessary to pay the debts of said club. The effects of said club were accordingly disposed of, but another assessment was necessary to pay said debts, and accordingly the directors, on January 14, 1897, passed a resolution as follows, viz.: "That an assessment of twenty-five dollars be levied upon each member of said corporation, payable January 26, 1897," and authorized suit to be commenced against each member in case of his default to pay said assessment, said assessment being necessary by reason of the existing indebtedness of said club. Defendant paid no part of the assessment, and suit was brought against him to recover the said assessment, amounting ²⁵⁶ to thirty-five dollars. The complaint was demurred to, the demurrer sustained, and plaintiff brings this appeal.

We are of the opinion that the demurrer was well taken, and the order sustaining it should be affirmed. There is nothing in the complaint to show what kind of a corporation it is, except that it was organized as a social club. There was no stock, no shareholders, and it does not appear that it was authorized

to have any capital stock. It did not have a constitution, by-laws, or any articles providing that any member might be assessed for debts of the corporation, and we find no statute authorizing such assessment as that sued upon in this action. The defendant did not contract to pay any such assessment, and the debts were contracted with the corporation, not with defendant. The creditors are not seeking to enforce a liability against defendant, but it is the corporation bringing suit against one of its own members, who is not even a stockholder in the insolvent concern. Of course, the extent of his liability is measured by the extent of the obligation he enters into.

"Very clearly, a corporation has not power, as incident to it, to assess for its own use a sum of money on the corporators, and compel them, by action at law, to the payment of it. The power must be derived from an express promise or from statute": Angell and Ames on Corporations, 11th ed., sec. 544, and cases there cited. See, also, Minneapolis Harvester Works v. Libby, 24 Minn. 327. The resolutions of the plaintiff to levy the assessments against the defendant, not being within the powers of the corporation, were illegal, and hence are of no effect.

Order affirmed.

CORPORATIONS—POWER TO LEVY ASSESSMENTS.—One who subscribes to the capital stock of a corporation is liable for an assessment upon his subscription without an express promise on his part: Windsor Electric Light Co. v. Tandy, 66 Vt. 248, 44 Am. St. Rep. 838. Directors of corporations have power to make calls or assessments on the corporate stock without showing that they are made for a corporate purpose, or that the business of the corporation required them to be made and paid, and this whether the statute confers such power, or whether it is entirely silent on the subject: Budd v. Multnomah St. Ry. Co., 15 Or. 413, 3 Am. St. Rep. 169.

BOELTER v. KLOSSNER.

[74 MINNESOTA, 272.]

EXEMPTIONS—WIFE, WHEN ENTITLED TO.—If a husband and wife are supporting themselves and their children by their joint labors in cultivating the wife's farm and caring for the household, and neither of them has any other farm or grain, either has a legal right to claim from the grain or provisions so raised on her farm an amount necessary for the support of the family for one year under the provisions of a statute exempting from attachment or final process "the provisions for the debtor and his family necessary for one year's support, either provided or growing."

E. H. Huebner, for the appellants.

W. H. Leeman, for the respondent.

272 **START, C. J.** This action was brought to recover from the defendants the value of certain wheat claimed by the plaintiff as exempt from sale on execution, but which was levied upon and carried away by the defendant Osberg as constable, at the instance of the defendant Klossner, by virtue of an execution issued on a judgment in his favor against the plaintiff. Verdict for the plaintiff, and the defendants appealed from an order denying their motion for a new trial.

The plaintiff claimed the wheat as exempt under the provisions of the General Statutes of 1894, section 5459, subdivision 7, which are to the effect that "the provisions for the debtor and his family necessary for one year's support, either provided or growing," shall not be liable to attachment or sale on any final process issued from any court in this state. The only question on this appeal is whether the wheat was so exempt. The defendants' contention is that she was not entitled to any exemption of provisions for the support of herself and family because she was a married woman, living at the time of the seizure **273** with her husband, whose legal duty it was to provide for his wife and family.

This exemption is not in favor of the head of the family, but in favor of the debtor, and is intended to protect the family, and must be liberally construed, so as to effectuate its humane purpose. Where husband and wife are living together, and both have provisions which may be appropriated for the support of the family, the wife is not entitled to the exemption, nor in a case where the husband alone is supporting the family, for in such case there would be no necessity to appropriate any provisions owned by her to the support of the family. But such

is not this case. The undisputed evidence shows that the plaintiff's family, at the time of the levy, consisted of herself, husband, and seven children, and that they were living as one family on her farm; that the husband had no farm or grain and that his occupation was performing the labor, with the assistance of a minor son, necessary to carry on the farm and raise the crops. The necessary inference from the evidence is that the husband and wife were supporting the family by their joint labors in cultivating her farm and caring for the household, and that neither of them had any other farm or wheat. Under the special facts of this case, we hold that either the wife or the husband had a legal right to claim, as exempt from the provisions so raised on her farm, an amount necessary for the support of the family for one year.

Order affirmed.

LAWS EXEMPTING PROPERTY FROM SALE UNDER EXECUTION should be liberally construed to carry into effect the purposes for which they were enacted: *Equitable Life Assur. Soc. v. Goode*, 101 Iowa, 160, 63 Am. St. Rep. 378. Such laws apply to all persons who support themselves and families by the labor of their hands: *Note to Millington v. Laurer*, 48 Am. St. Rep. 390. As to who may claim the benefit of exemption laws, see note to *Rockwell v. Hubbell*, 45 Am. Dec. 254.

EXEMPTIONS—GRAIN AND PROVISIONS.—Under a statute exempting from execution grain and provisions necessary for the support of the debtor and his family for one year, he is entitled only to the grain necessary for food of himself and family for that time, and not an amount of grain sufficient, in the absence of other property, to support him and them for a year: *George v. Hunter*, 48 Kan. 651, 30 Am. St. Rep. 325.

ABBOTT v. MOLDESTAD.

[74 MINNESOTA, 293.]

SPECIFIC PERFORMANCE OF CONTRACT TO PAY THE PURCHASE MONEY.—If parties make a mutual executory contract for the sale of land, the vendor agreeing to convey and the vendee to pay the purchase price, equity regards the vendee as the beneficial owner of the land, though he has not paid the purchase price. Hence, in such case, the vendor may proceed to enforce specific performance by a suit wherein the vendee's equitable estate under the contract may be sold in pursuance of the decree.

SPECIFIC PERFORMANCE—DISCRETION OF COURT.—Although a court may, in the exercise of a sound discretion, grant or withhold a decree for the specific performance of an executory contract for the sale and conveyance of land, this discretion is not arbitrary or capricious, but judicial, and if the contract has been

entered into by competent parties, and is equitable and not objectionable in its nature and the circumstances surrounding it, specific performance is a matter of right.

Baldwin & Patterson and Palmer & Beek, for the appellants.

A. C. Dolliff, for the respondents.

²⁹⁶ BUCK, J. On September 15, 1891, the plaintiffs' testator, Henry G. Abbott, as party of the first part, entered into an executory contract with the defendant Ole O. Moldestad, as party of the second part, substantially as follows:

1. Abbott, in consideration of the covenants and agreements of Moldestad, sold and agreed to convey by warranty deed to the latter the north half of the southwest quarter of section 4 in township 113, of range 36 west, containing eighty acres of land.

2. Moldestad, as consideration for the conveyance of said premises, agreed to pay Abbott the sum of eight hundred and eighty dollars, as follows: Eighty dollars down; one hundred dollars November 1, 1892; two hundred dollars November 1, 1893; two hundred dollars November 1, 1894; three hundred dollars November 1, 1895—with interest at eight per cent per annum, payable November 1, 1892, and annually thereafter, according to the conditions of four promissory notes, and to pay all taxes or assessments that thereafter might be levied or assessed upon said premises.

3. Time was made the essence of the contract, and if Moldestad ²⁹⁷ made default in any of the payments of interest or taxes, or any of the covenants in the contract, the same was to be void, at the election of Abbott; but, until such default, Moldestad was to have possession of the premises. The covenants in the contract were to run with the land, and mutually bind the heirs, executors, administrators, and assigns of the respective parties.

During the years 1892, 1893, 1894, and 1895, taxes were levied on said land, which, with interest on the same, amounted to fifty-nine dollars and fifty-five cents, which Moldestad failed to pay, and plaintiffs were compelled to pay the same. The defendants paid the eighty dollars down, took possession of the land, cropped it during the years 1893, 1894, 1895, and part of it in 1896, but never made any further payments of the purchase price.

The real value of the land does not appear, but there is no claim that there was any fraud, deceit, or mistake in regard to its value or condition, and this question need not be considered.

The vendor, Abbott, died at the city of Utica, in the state of New York, on January 17, 1896—about three months after the last installment was due on the contract.

Moldestad finally abandoned the land, without any apparent cause, and especially without any act on the part of the vendor causing him to do so. Nor did the vendor or his representatives ever take possession of the land after the said executory sale, and they have at all times been ready, able, and willing to execute to him a good and sufficient warranty deed, according to the terms of said contract, and thereby to convey to him a good title to said land, free from encumbrance.

The relief sought by the plaintiffs is that an early day be fixed by the court for the payment of the whole amount due under the contract—the amount to be ascertained by the court as provided by the terms of the contract—and that the amount so ascertained be decreed to be a lien on said premises, and that the land be sold to pay the same, with expenses of sale and costs and disbursements of the action, and that plaintiffs have judgment for the deficiency, if any, against the defendant Ole O. Moldestad, and that he and his wife, and all persons claiming under, by, or through them, or either ²⁹⁸ of them, be barred and foreclosed of all right, claim, title, or interest in and to said land.

The defendants interposed an answer, but the trial court found the allegations therein to be untrue. However, the defendants asked that the contract be adjudged null and void, and rescinded; that they have judgment for no cause of action on the part of plaintiffs against them; that the purchase money notes be surrendered to them and canceled, or, in default of their being so delivered and canceled, that they recover the sum of eight hundred dollars and interest, with costs and disbursements.

The trial court decided the cause in favor of the defendants, and refused to make any decree enforcing specific performance, and ordered that judgment be entered annulling the contract; that defendants had no right, title, claim, or interest in the land; and that they were entitled to have the said purchase money notes canceled.

In this holding we think the trial court erred. In cases of a contract for sale of real estate before conveyance, the vendor has the legal title, which he holds as security for the performance of the vendee's obligation, and as trustee for the vendee, subject to such performance; and that title may be conveyed

or devised, and will descend to his heirs: 3 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1261.

In equity, the vendee is regarded as the beneficial owner of the premises, even though he has not paid the purchase price; but where the contract is mutual, as in this case, he can compel the vendor to convey, upon payment of the purchase price. But by mere neglect or refusal to pay, he cannot defeat the vendor's right to enforce payment of the purchase money by a suit in equity against the vendee's equitable estate in the land, instead of by an ordinary action at law to recover the debt. The vendor may proceed to enforce specific performance by an action wherein the vendee's equitable estate under the contract is sold in pursuance of a judicial decree, which will operate as an assignment of the vendee's rights under the contract, and would not operate as a cancellation of the contract itself: 3 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1261.

By reference to the terms of the contract, which we have already stated, it will appear that the agreement is one to which these ²⁰⁹ rules may be applied. The vendor promised to do a certain act upon his part, viz., convey the land; and, in consideration thereof, the vendee promised to pay the purchase price of the land. Pomeroy, in his work on Specific Performance of Contracts, chapter 1, section 6, says: "It might be supposed, from the general principles heretofore stated, that only the party who is to receive the benefit of the acts or omissions promised by the other could resort to equity, and enforce their specific performance according to the terms of the undertaking, while the party who is to receive the benefit of the money payment would be left to his legal remedy—the recovery of the money judgment in a common-law action. This supposition, however logical it may appear, is prevented by a well-established doctrine of equity, that the right to a specific performance, if it exists at all, is, and necessarily must be, mutual; in other words, it is and must be held and be capable of being enjoyed alike by both parties in every agreement to which the jurisdiction extends. As a familiar example, in the simplest form of contract for the sale of land, when the vendor agrees to convey, and the purchaser merely promises to pay a certain sum as the price, since the latter may, by a suit at equity, compel the execution and delivery of the deed. The former may, also, by a similar suit, enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money."

It is contended by the defendants' counsel that the granting

or withholding a decree for a specific performance of an executory real estate contract is in the sound discretion of the court. This observation is frequently made, and many authorities are frequently cited to sustain it, but the meaning of this proposition is not that the court may arbitrarily or capriciously compel specific performance of one contract, and refuse to compel performance of another, but "that the court has regard to the conduct of the plaintiff, and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor. 'If the defendant,' said Plumer, V. C., 'can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information upon that subject, will not interpose.' But of these circumstances the court judges by settled and fixed rules; hence the discretion is said to be not arbitrary or capricious, but judicial; hence, also, if the contract has ³⁰⁰ been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages. The mere hardship of the results will not affect the discretion of the court": Fry on Specific Performance, sec. 25. To the same effect is Waterman on Specific Performance of Contracts, section 6.

In the case of *Thompson v. Winter*, 42 Minn. 121, Gilfillan, C. J., at page 122, said: "The matter of compelling specific performance is one of sound and reasonable discretion—of judicial, not arbitrary and capricious, discretion. There must be some reason, founded in equity and good conscience, for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud or unconscionableness in the contract, or in some laches on the part of the plaintiff changing the circumstances so as to make it inequitable to compel a conveyance, or where the claim is stale, or there is reason to believe it was abandoned. But, whatever the reason may be, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff, or because the defendant had some independent claim which he might not be able to enforce against the plaintiff. If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all

unclosed transactions between the parties, whether relating to the contract or subject matter of the action, or entirely distinct from it.

"In this case there is no reason to suppose the contract other than a fair one. The plaintiff has been prompt in performing on his part, and in seeking his remedy. The defendant has a claim against plaintiff, entirely independent of the contract to convey, which claim, by the terms of the agreement under which it arose, was not to become due for more than three years after the time when he was to convey. The possibility that when it becomes due he may not be able to enforce it, by reason that plaintiff's insolvency may continue, does not make it inequitable to enforce this contract already matured. That a purchaser may have an adequate remedy by action for damages, although a reason for not holding what he has done to be part performance to take the case out of the operation of the statute of frauds, is of itself no reason for withholding the proper remedy, where the contract is valid under the statute."

We are of the opinion that, in the entire absence of any fact which renders it inequitable to enforce specific performance, the ³⁰¹ right thereto does not rest wholly in the judicial discretion of the trial court. If the facts are fairly in controversy, which would render its enforcement inequitable, or rank injustice so appears on the face of the contract, or by evidence independent of it, as to make enforcement of the contract inequitable, the court need not interpose its equitable powers to enforce it.

"The relief demanded in an action for the specific performance of a contract lies in the discretion of the court, only so far as it must necessarily judge whether, under the circumstances, the agreement is or is not an inequitable one. When that fact is determined, judicial discretion ceases": Fry on Specific Performance, 3d American ed., 11, note 1, and authorities cited.

There is nothing in this contract which makes it invalid or objectionable in its nature, or in the circumstances connected with it. It is not claimed that there was any misrepresentation, fraud, or mistake. The parties stood upon an equality, and there is no claim of overreaching or advantage taken by either party.

Moldestad had the use of the whole eighty acres for three years, and part of it for another year, and there is no claim that the crop was at any time a failure, or even partially so; and his mere insolvency, if such is the fact, would not of itself justify the court in refusing specific performance of a contract so fair

on its face. The contract was a mutual one; that is, each party had a mutuality of remedy. There is not the slightest evidence in this case to shock the conscience, or show that it would produce a hardship to enforce specific performance. Merely because a party testifies that he is unable to pay for the land which he has bargained for by a written contract does not constitute a defense against its enforcement, especially in the absence of fraud, ambiguity, or mistake.

As against the eighty dollars paid down on the purchase price of the land, the defendants have had many years' use of it, without paying any taxes, and the equities seem to be rather with the plaintiffs than the defendants.

Nothing appearing that the plaintiffs should be deprived of their equitable remedy, it is the duty of Moldestad to fulfill all of its stipulations on his own part, as the plaintiffs stand ready to do all that the vendor agreed to do on his part.

³⁰² The judgment of the trial court is reversed, and it is directed to enter judgment on the findings of fact in favor of plaintiffs for the relief demanded in the complaint.

A VENDOR MAY MAINTAIN A BILL FOR SPECIFIC PERFORMANCE of a contract for the purchase of land, where the vendee refuses to accept a conveyance or to pay the purchase money; and the decree, in such a case, should direct a sale of the premises in case of default in payment: *Andrews v. Sullivan*, 2 Gilm. 327, 43 Am. Dec. 53, and note.

SPECIFIC PERFORMANCE OF CONTRACTS FOR THE CONVEYANCE OF LAND is not a matter of right in either party, but rests in the sound discretion of a court of equity: *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, and note.

NICKERSON *v.* CRAWFORD.

[74 MINNESOTA, 366.]

EXEMPTIONS—LIENS FOR LABOR OR MATERIALS.—A constitutional provision that all property exempted by law from seizure and sale shall be liable to seizure and sale for any debt incurred to any person for work done or materials furnished in the construction, repair, or improvement of such property, is self-executing, and its direct effect is to make property which is exempt from seizure and sale for other debts liable for the debts enumerated to the same extent and in the same way as if no exemption law existed.

HOMESTEADS—SALE UNDER MECHANICS' LIENS.—Under a constitutional provision that all property exempted by law from seizure and sale shall be liable to seizure and sale for any debt incurred to any person for work done or material furnished

In the construction, repair, or improvement of such property, a homestead may be subjected to levy and sale on execution under an ordinary money judgment by a creditor or his assignee for a debt contracted for material furnished to erect a dwelling-house on the homestead. This remedy exists, although notes of the debtor may have been taken as evidence of the debt and renewed from time to time.

C. S. Wheaton, for the appellants.

F. T. White, for the respondents.

368 MITCHELL, J. The defendant Mary Jane Crawford was the owner of eighty acres of land, which she occupied, and still occupies, as a homestead. In 1891 she purchased from the plaintiffs a quantity of lumber for the purpose of erecting, and which was actually used in erecting, a dwelling-house on the premises. For the purchase price of the lumber she executed to the plaintiffs two promissory notes. One of these notes the plaintiffs discounted at a bank, guaranteeing payment. When this note matured, it was renewed by defendant giving a new note, indorsed by the plaintiffs, and payable to the bank. This note was renewed from time to time by other notes of like tenor. The defendant having failed to pay the last renewal note, the plaintiffs, as indorsers, were compelled to pay it, the bank transferring it to them. On this note and the other note retained by the plaintiffs they brought an ordinary action for the recovery of money, and obtained judgment against the defendant, on which they caused execution to be issued, and the land already referred to to be levied on and sold, they themselves being the purchasers at the execution sale. The time of redemption having expired, and no redemption having been made, the plaintiffs brought this action to recover possession of the premises.

369 1. Article 1, section 12, of the constitution, as originally adopted, provided that: "A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law."

This was not self-executing, but contemplated and required legislative action to carry it into effect: *Kelly v. Dill*, 23 Minn. 435. The legislature did carry it into effect by passing a law determining the amount of the exemption.

In 1888 this section of the constitution was amended by adding thereto: "Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction,

repair, or improvement of the same; and provided further that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed."

These provisos are clearly self-executing: *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626. They require no legislation to carry them into effect. Their direct effect is to make property, which is exempt from seizure and sale for other debts, liable to seizure and sale for debts of the kinds enumerated, to the same extent, and in the same way, as if no exemption law existed.

The contention of defendants' counsel, if we correctly understood him, is that this constitutional amendment makes debts of the specified classes liens on the otherwise exempt property, and that the only remedy which the legislature has provided is to enforce the lien under the provisions of the mechanic's lien law. But the constitution furnishes no basis for any such claim. It does not make the specified debts a lien on the property, but merely provides that the otherwise exempt property shall be subject to seizure and sale for such debts. They may be a lien under some statute, but, so far as the constitution is concerned, debts of the enumerated classes only become liens on a homestead when reduced to judgment and docketed; and then they become liens on the homestead, the same as on any other real estate of the debtor.

370 Neither by the constitution nor by any statute is the creditor restricted to any particular form of remedy for the collection of his debt out of the homestead or other exempt property. The constitution leaves him to seize and sell it as he might any other property under the general statutes of the state, which would be by obtaining and docketing an ordinary money judgment, and then selling the property on execution. This is the common practice in this state, and, so far as we have examined, of every other state having similar constitutional or statutory provisions: *Waples on Homesteads*, 333 et seq., and cases cited; *Smith v. High*, 85 N. C. 93; *Greeno v. Barnard*, 18 Kan. 518; *Hurd v. Hixon*, 27 Kan. 722.

2. There is nothing in the taking, renewing, or discounting defendants' notes for the price of the lumber which at all affects the case. There is no finding of the court, or any claim made, that any of these notes were taken in absolute payment of the debt. Through all the mutations of the evidences of it, the debt remained the same.

Neither is the fact that some of the renewal notes were, at the

direction or with the consent of the plaintiffs, made payable to the bank, at all material. The liability of this property to seizure and sale for this debt existed in favor of plaintiffs' assignees as well as in favor of themselves: *Waples on Homesteads*, 346 et seq.; *Langevin v. Bloom*, 69 Minn. 22, 65 Am. St. Rep. 546. The principle involved is the same whether the debt is a lien on specific property, or whether, as in this case, the property is subject to seizure and sale for the debt.

What counsel says as to the extension of time by the acceptance of renewal notes is based upon the erroneous assumption that plaintiffs' remedy was by enforcement of a lien under the mechanic's lien law, and hence need not be further considered.

The judgment is reversed, and the cause remanded, with directions to the court below to amend its conclusions of law in accordance with this opinion, and, upon the facts found, to order judgment for the plaintiffs, as prayed for in the complaint.

A MECHANIC'S LIEN CANNOT BE ENFORCED, as a general rule, against property not subject to sale under execution: *Badger Lumber Co. v. Marion etc. Co.*, 48 Kan. 187, 30 Am. St. Rep. 306. A homestead is not subject to a mechanic's lien: *Morgan v. Beuthein*, 10 S. Dak. 650, 66 Am. St. Rep. 733. However, under the statutes and constitutions of some of the states, this rule has been changed; and real property, impressed with a homestead claim, is not exempt from a lien in favor of a mechanic, laborer, or materialman who furnishes labor or material in the improvement of the homestead, and therefore it can be sold in satisfaction of such lien: *Note to Mertz v. Berry*, 45 Am. St. Rep. 383.

A MECHANIC OR MATERIALMAN DOES NOT WAIVE HIS RIGHT TO A LIEN by accepting, at the owner's instance and request, the latter's promissory note, payable in sixty days, for the amount of his claim, the note being given for the sole purpose of extending the time of payment and suspending the right to foreclose the lien for that length of time; and the assignment of such note does not waive or extinguish the lien, nor prevent the assignee from obtaining a decree for its foreclosure: *Hill v. Alliance Bldg. Co.*, 6 S. Dak. 160, 55 Am. St. Rep. 819. Waiver of mechanics' liens is discussed at length in the note to *Kilpatrick v. Kansas City etc. R. R. Co.*, 41 Am. St. Rep. 761.

DYSON v. ST. PAUL NATIONAL BANK.

[74 MINNESOTA, 489.]

DEBTOR AND CREDITOR.—PREFERENTIAL MORTGAGES AND SECURITIES given by an insolvent debtor are valid if free from fraud in fact, except in insolvency proceedings.

PARTNERSHIP—PREFERENCES BY.—If the members of a partnership, in good faith, solely to secure its debts to one or more, but not to all of its creditors, transfer to them, by bill of sale or otherwise, the firm property, reserving to themselves the right of redemption, the conveyance is not an assignment for the benefit of creditors, but a mortgage and a valid security, except in insolvency proceedings, even though the debtors were then insolvent, to the knowledge of the mortgagees, and the transfer covers all of the partnership assets.

Morphy, Ewing & Gilbert, for the appellant.

Stringer & Seymour, for the respondent.

443 **START, C. J.** The respondent herein, the St. Paul National Bank, was summoned as garnishee, the plaintiff claiming that it had money and other property in its hands and under its control belonging to the principal defendants. It appeared and made disclosure, in which it denied the plaintiffs' claim; and thereupon a supplemental complaint against it was filed, to which it made answer.

The case was tried by the court without a jury, resulting in findings of fact and conclusions of law in favor of the respondent; and the plaintiff appealed from an order denying his motion for a new trial.

The material facts found by the trial court, briefly stated, are: The defendants on June 12, 1895, were copartners in the lumber business at Amery, in the state of Wisconsin, and each was a resident of that state. They were then insolvent, but believed that sufficient funds would be realized from a previous sale of a portion of their property to pay their debts in full. The respondent did not then know or have reasonable cause to believe them insolvent. On the day named the defendants were indebted to the respondent bank in the sum of twenty-three thousand dollars, and they then executed and delivered to the bank an absolute bill of sale (containing a warranty, and an irrevocable power of attorney to receive, collect, and recover the personal property thereby sold) of substantially all of their remaining copartnership assets, consisting of promissory notes, accounts, and other property, but not of their individual property, of which one of the defendants then had a considerable amount.

At the same time, and as a part of the same transaction, it was mutually agreed by the parties to the bill of sale that it should be given solely as security for the payment of such indebtedness, except that it was provided that the bank should pay five per cent of the proceeds of the property upon a claim of Dr. Wade against the defendants amounting to two thousand dollars; the remainder of such proceeds to ⁴⁴⁴ be applied to the payment of its own debt against them. If any balance was left, it was to be returned to the defendants. It was also agreed between the parties that the defendants might at any time after the making of the bill of sale pay their indebtedness to the bank and Dr. Wade, and thereupon the bill of sale should be void, and the title to all the property therein described should revert to them. The bank took immediate possession of the notes, accounts, and property set forth in the bill of sale, and has since been collecting the amounts due thereon as rapidly as practicable, and has realized a net balance therefrom of seventeen thousand and seventy dollars and sixty-nine cents, which it has applied to the payment of its debt against the defendants. The respondent is a banking corporation, and its place of business was and is in the city of St. Paul, at which place the evidence shows the contract was made.

The defendants for some time prior to the making of the bill of sale maintained an office at St. Paul, in charge of an agent, for the sale of lumber and collection of accounts due therefor; but their principal place of business was at Amery.

The trial court's conclusions of law were to the effect that the bill of sale, in connection with the agreement, was, in effect, only a mortgage, and secured the bank's debt against the defendants, and that it is entitled to hold the property described therein until the debt is paid; that, if any balance remains after the payment of the indebtedness secured by the mortgage, the bank is responsible to the plaintiff therefor, to the extent of his claim, and that, other than this, he is not entitled to any relief.

1. The plaintiff claims that the conclusions of law are not justified by the facts found by the court, for the reason that the bill of sale and agreement constitute in law an assignment by insolvent debtors of the whole of their property for the benefit of special and preferred creditors, with a resulting trust in the surplus for the benefit of the debtors, to the exclusion of their other creditors. If this proposition be correct, the transaction is void as to creditors, whether its validity is to be tested by the laws of

Wisconsin, as plaintiff claims, or by the laws of Minnesota, as it must be.

The contract was made in this state; the money coming to the hands of the bank, a domestic creditor, by virtue thereof, which the ⁴⁴⁵ plaintiff seeks to reach by this action, is within this state; and, if the contract is valid under our law, it will be enforced, even if invalid under the laws of Wisconsin. To do otherwise would simply deprive a domestic creditor of the benefit of its security valid by our laws, so that the plaintiff, a non-resident creditor, might obtain a preference.

The question then is, Do the findings of fact of the trial court justify the conclusion that the contract is fraudulent and void, as a matter of law, as to creditors? In considering this question we are to keep in mind that there is neither evidence nor finding in this case that the transaction in question was fraudulent in fact; hence it is immaterial whether the vendors in the bill of sale were insolvent or not, or whether the bank knew them to be insolvent or not.

It would be otherwise if this was an action by an assignee or receiver in insolvency to set aside the transaction as a preference. Except in such an action or proceeding, preferential mortgages and securities, if free from fraud in fact, are valid: *Berry v. O'Connor*, 33 Minn. 29; *Bannon v. Bowler*, 34 Minn. 416; *Mackellar v. Pillsbury*, 48 Minn. 396.

It is claimed on behalf of the plaintiff that the decision of this court in the case of *Truitt v. Caldwell*, 3 Minn. 257 (364), 74 Am. Dec. 764, answers the question in accordance with his contention. The doctrine of this case seems to go farther than the general trend of the decisions of the courts of other states: See *Jones on Chattel Mortgages*, secs. 352-356. But it does not go far enough to sustain plaintiff's claim, and is clearly distinguishable from the one at bar. In the former case there was an unconditional transfer of the legal title of the property. In the latter there was a conditional transfer of the legal title for the purpose of security only. In the former case there was no right of redemption reserved to the vendor, but a trust reserved in the surplus for his benefit, without first paying all of his debts. In the latter the property could be redeemed at any time by paying the indebtedness secured thereon. In the one case the absolute legal title was interposed between the creditors and the property of their debtor, with a resulting trust in the avails thereof to him. In the other the vendee did not acquire the absolute ⁴⁴⁶ title subject to such trust, but a lien upon it, with power of sale

and the property remained liable to the process of the court at the suit of creditors, subject to the lien of the bank.

It is true in this case that the bill of sale and contract provide for the payment to the vendors of any surplus realized from the property remaining after the payment of the indebtedness secured on the property, but the title to the surplus is exactly the same as the title to the property itself, and may be reached by creditors in the same way.

It is also true that the bank was authorized to, and did, collect the accounts, and convert the property into money, precisely as if it were the owner thereof; but it was by the contract irrevocably made the attorney of the vendors for this purpose. The exercise of this power would not prevent the vendors from redeeming the balance of the property, and the avails of what had been converted into money, by paying the indebtedness which it secured. The fact that this right was given by the contract to collect the accounts and convert the property into money would not prevent the transaction from being a valid pledge or mortgage of the property. It is immaterial in this case whether it was strictly a mortgage or pledge.

The distinctive characteristics of the transfer in the case of *Truitt v. Caldwell*, 3 Minn. 257 (364), 74 Am. Dec. 764, are concisely expressed in the opinion in these words, at page 266 (373): "This conveyance is not simply a transfer of property to satisfy a debt; neither is it a mortgage or a pledge to secure the claim of the plaintiffs. The grantor here has no resulting interest in the property conveyed, upon payment of the debt, as is a usual, if not necessary, incident to a pledge or mortgage. No forfeiture or power of sale is given upon the happening of any contingency, nor any language used showing an intent on the part of the grantor to convey the property as security for the payment of his debt." The case is cited, and distinguished from one similar in some respects to the one at bar, in the case of *Wilcoxon v. Annesley*, 23 Ind. 285, 295.

For the reason suggested, the case of *Truitt v. Caldwell*, 3 Minn. 257 (364), 74 Am. Dec. 764, is not here in point. The same is also true of the cases of *Camp v. Thompson*, 25 Minn. 175, and *Butler v. White*, 25 Minn. 432, relied on by the plaintiff; for by the instruments construed in those cases the entire property in the lumber conveyed was intended to pass, and did pass, to the respective vendees, and no property therein was reserved to the vendor, or intended to be; hence it was correctly held that the instruments were not mortgages. Such being the

case, the question here under consideration is to be determined on principle.

According to the findings of fact by the trial court, the transaction in question had none of the elements of an assignment for the benefit of creditors, which creates a trust vesting the legal title in the assignee, and placing the property beyond the reach of creditors, except the right to share in the distribution of the trust estate.

Neither was the transaction a conveyance of property in trust for the use of the person making the same: Gen. Stats. 1894, sec. 4218. It created no trust, but a lien to secure an indebtedness; and, as already suggested, the mere fact that the vendors were insolvent, and the bill of sale included all of their firm property, did not render the transaction void as a matter of law. Such facts would be competent and cogent if the transaction were assailed for fraud in fact.

Upon principle and authority, we hold that if the members of a copartnership, in good faith, solely to secure their debts to one or more, but not all, of their creditors, transfer to them, by bill of sale or otherwise, the firm property, reserving to themselves the right of redemption, the conveyance is not an assignment for the benefit of creditors, but a mortgage, and a valid security, except in insolvency proceedings, even though the debtors were then insolvent, to the knowledge of the mortgagees, and the transfer covers all of the copartnership assets: Jones on Chattel Mortgages, sec. 355; 1 Cobbey on Chattel Mortgages, secs. 101, 102; Union Bank v. Kansas City Bank, 136 U. S. 223; May v. Tenney, 148 U. S. 60; Rainwater etc. Co. v. Malcolm, 51 Fed. Rep. 734; Eureka etc. Works v. Bresnahan, 66 Mich. 489; Warner v. Littlefield, 89 Mich. 329; Cutter v. Pollock, 4 N. Dak. 205, 50 Am. St. Rep. 644. It follows that the conclusions of law by the trial court in this case are supported by the findings of fact.

⁴⁴⁸ 2. But it is urged with earnestness and undoubted candor that the findings of fact in this case are not sustained by the evidence. We have attentively considered the record, and find that they are, and so hold.

The motion by plaintiff for additional findings of fact was rightly denied, for they were immaterial, in our view of the case.

Order affirmed.

DEBTOR AND CREDITOR—PREFERENTIAL MORTGAGES.—
A debtor in failing circumstances may prefer one creditor to another by giving him adequate security for his debt, to the exclusion of others. Every mortgage necessarily tends to hinder and delay

creditors other than the mortgagee, but, if fairly and honestly made, it is neither an unjust nor unlawful interference with the rights of others, within the terms of a statute making conveyances void if intended to hinder or delay creditors: *Sabin v. Columbia Fuel Co.*, 25 Or. 15, 42 Am. St. Rep. 756. Chattel mortgages executed at the same time by an insolvent debtor to certain of his creditors, giving them priority, but not allowing them to prorate, if made in good faith to secure bona fide debts, will not constitute a fraudulent assignment for the benefit of creditors preferred as against those not preferred, although such mortgages cover all the assets of the mortgagor: *Note to Monaghan Bay Co. v. Dickson*, 39 Am. St. Rep. 708.

DEBTOR AND CREDITOR—PARTNERSHIP PREFERENCES. While a partnership is in the active management of its affairs, the members thereof may prefer one of their creditors to others, or in the absence of statutory prohibitions, execute a formal assignment for the benefit of their creditors, in which some of such creditors may be preferred to others: *Note to Smith v. Smith*, 43 Am. St. Rep. 373.

GRAY v. TIMES NEWSPAPER COMPANY.

[74 MINNESOTA, 452.]

LIBEL—RETRACTION—BURDEN OF PROOF.—If, in an action for newspaper libel, the defense is, that the article was published in good faith, and that the defendant published a full and fair retraction as provided by statute, the burden of proof is upon him to establish such defense.

LIBEL BY NEWSPAPER—GOOD FAITH—MISTAKE.—In an action to recover for a newspaper libel, the question of good faith of defendant, and whether the falsity of the published article was due to his mistake of the facts, is for the jury to determine, unless the evidence to establish the defense is undisputed, and there is no reasonable ground for drawing different conclusions therefrom.

LIBEL BY NEWSPAPER—RETRACTION.—If, in an action for newspaper libel, the defense of a retraction is set up, the question whether the published retraction was full and fair, as required by statute, is ordinarily one of law for the court.

LIBEL—RETRACTION—WHAT IS NOT.—A published retraction of an original libelous newspaper article which does not refer thereto, nor admit, nor even suggest, that the defendant ever published it, or that he desires to or does retract it, or that he ever had any part in giving publication to the defamatory statements, is not a fair and full retraction, as required by statute, and is not a defense to an action for libel founded on the original libelous article nor does such retraction bar the recovery of compensatory damages.

LIBEL.—THE RETRACTION OF A LIBELOUS NEWSPAPER ARTICLE required by statute to constitute a defense, must clearly refer to and admit the publication of the article complained of, and directly, fully, and fairly, without any uncertainty, evasion or subterfuge, retract the alleged false and defamatory statements therein.

H. V. Mercer, for the appellant.

A. B. Jackson, for the respondent.

454 **START, C. J.** The defendant is the proprietor and publisher of the "Minneapolis **455** Times," a daily newspaper hereinafter designated as the "Times," and this is an action for publishing therein a libel of the plaintiff.

The record discloses substantially these facts: The plaintiff James E. Gray, a young man of good reputation, about 10 o'clock on the evening of August 10, 1897, was riding his bicycle along the boulevard near Lake Calhoun, in the city of Minneapolis, when he was stopped by two men waiting by the roadside, holding wheels, who shot him through the arm, knocked him senseless, robbed him of his money, and left him lying unconscious across his wheel, where he was afterward found and cared for. The defendant next morning published in the "Times" an account of the robbery, which was substantially correct. But on August 19th it published in the "Times" another article, which, so far as it related to the plaintiff, was this:

"FAKING THE HOLD-UPS.

"Police Have Enough to do Without This Annoyance.

"Two or Three Cases Where Robberies Were Complained of, and Never Occurred.

"Fake hold-ups seem to be the regular order of the day now. The police are considerably disgusted, for, fake or no fake, they receive the usual amount of roasting from the public, who argue that the policemen and detectives are not doing their full duty.

"Within the past few days the first fake case of note was that of a young man named Gray, who claimed to have been held up by two men on bicycles while he was riding his wheel on Lake Calhoun boulevard, shot in the arm, sandbagged, and robbed of about \$5. Gray's case bore evidence of sincerity, yet upon looking it up the police believe that no hold-up took place; their real theory being that Gray was shot in a row over a woman with whom he was bicycle riding. Detective Hoy has a witness who claims to have seen the whole affair. . . .

"If the department can find a way to do it, it is not improbable that some people who claim they are held up on the street and robbed, when a robbery or attempted robbery never occurred at all, may be made an example of, as a warning to others."

The plaintiff served notice upon the defendant, specifying the statements therein which he claimed to be false and defamatory. The defendant in the next issue of its paper published an article of the purport following:

456 "CRY 'FAKE' TOO QUICK.

"Police Discredit Stories Which They Cannot Fathom.

"A Glaring Illustration Furnished by the Case of James E. Gray.

"Considerable criticism has grown out of the apparent freedom with which the police cast discredit upon every unusual hold-up or robbery, and at once assume that anything which they cannot trace is a fake, because they cannot fathom it. Unless every detail is as plain to them as the nose upon each individual face, and the clearest motive is attributable to a robbery or hold-up, there is always at hand a cry of 'fake' to be hurled at the complainant.

"One case of this kind is the case of James E. Gray, the young man who, on the night of Tuesday, Aug. 10, was held up by two men, sandbagged, shot in the arm, and robbed of some \$5 or \$6, while bicycle riding on Calhoun boulevard.

"Mr. Gray is a young man, well connected and respectable. He formerly resided in Fergus Falls, and during his residence in Minneapolis has roomed at the Y.M.C.A. Building. Mr. Gray's story of the robbery and assault, as it occurred, was published the morning after the robbery, and was soon followed by the usual innuendo, because it was the first bicycle robbery which the police had had to deal with, and was a novelty, and not understood. . . .

"A report was circulated among the police that there was a woman in the case, and as Mr. Gray has many friends, not only in Minneapolis, but all over the state, the report embarrassed him considerably, inasmuch as it was without foundation. The case was one of highway robbery and assault, pure and simple."

The article also contained a correct account of the assaulting and robbing of the plaintiff. No other retraction was published by the defendant. Thereupon this action was brought.

The defense was substantially that the defendant published the alleged libel in good faith, and that it published a full and fair retraction thereof, in accordance with the statute.

On the trial, evidence was introduced by both parties on the issue of the good faith of the publication, and the defendant gave in evidence the article published after the service of the plaintiff's notice.

At the close of the evidence the trial court directed the jury to return a verdict for the defendant, which was done, and the 457 plaintiff appealed from an order denying his motion for a new trial.

The trial court, in granting the defendant's motion to direct a verdict for it and in denying the plaintiff's motion for a new trial, necessarily held, as a matter of law, that the defendant published the article complained of in good faith, and that it published a full and fair retraction thereof. This ruling is assigned as error.

The newspaper libel retraction statute (Gen. Stats. 1894, secs. 5417, 5418) provides that before any action shall be brought for a newspaper libel the aggrieved party shall serve a notice upon the publisher, specifying the statement therein claimed to be false and defamatory. "If it shall appear, on the trial of said action that the said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts and that a full and fair retraction of any statement therein alleged to be erroneous was published in the next regular issue of such newspaper, or, in case of daily papers, within three days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libelous, then the plaintiff in such case shall recover only actual damages; . . . provided, that nothing in the provisions of this act shall be held to apply to any libel published of or concerning any female." Section 5418 defines the term "actual damages" as used in the statute.

Good faith on the part of the publisher, and the publication of a full and fair retraction, are made a defense by this statute, as against all damages except actual damages as defined therein. The burden is upon the publisher to establish such defense.

The question of good faith, and whether the falsity of the article was due to mistake of the facts, is always one of fact for the jury, unless the evidence to establish the defense is undisputed, and there is no reasonable ground for drawing different conclusions therefrom.

What constitutes "good faith," as the term is used in this statute, was defined in the case of *Allen v. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707, to the effect that mere belief on the part of the publisher in the truth of the publication is not alone sufficient, ⁴⁵⁸ but it must have been honestly made in the belief of its truth, and upon reasonable grounds for the belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances. The evidence in this case was not so conclusive of the defendant's good faith, as so defined, as to justify the trial court in treating

it as a question of law, and directing a verdict. The question should have been submitted to the jury as a question of fact.

On the other hand, the question whether the retraction in a given case is a full and fair one, within the meaning of the statute, is ordinarily a question of law for the court, because it involves the comparison and construction of two written instruments. In this particular case the question whether the alleged retraction was a compliance with the statute was clearly a question of law, for a comparison and construction of the two articles did not in any way depend on extrinsic evidence, disputed or otherwise.

The statute does not require the retraction to be in any particular form. It must, however, clearly refer to and admit the publication of the article complained of, and directly, fully, and fairly, without any uncertainty, evasion, or subterfuge, retract (that is, recall) the alleged false and defamatory statements therein.

It is necessary that the retraction should refer to the original publication in order to be fair, because the purpose of the statute in requiring a publication of the retraction in the next issue of the newspaper after service of the notice, and in as conspicuous a place and type as was the article complained of, is to eradicate, so far as possible, from the minds of the persons who read the libel the false and unfavorable impressions of the plaintiff engendered thereby. To accomplish this result the retraction must be identified with and follow the libel as quickly as practicable, so that the truth may overtake the libel. How would it be possible to recall the libel without referring to and admitting its publication in the newspaper in which the retraction was published?

The publication complained of in this case was not privileged, and was libelous per se; for it, in effect, charged the plaintiff with fabricating the story of his assault and robbery for the purpose of ⁴⁵⁹ accounting for his wounds received in a row over a woman. A simple comparison of this article with the so-called retraction is all that is necessary to demonstrate that, as a matter of law, the latter is not a full and fair recall or retraction of the libel, within the rule stated. It does not refer to the original article, or admit or even suggest that the defendant ever published it, or that it desires to or does retract it, or that the defendant ever had any part in giving publication to the defamatory statements.

In effect, the supposed retraction was a criticism of the police

department, and an attempt to place upon it the responsibility for the rumor or innuendo to the effect that the plaintiff had fabricated the claim that he had been assaulted and robbed in order to conceal his connection with a disreputable transaction. It fully and generously vindicated the plaintiff against the innuendo of the police force, but as to the defendant's own connection with and responsibility for the publication of the libel it was silent. The publication of the attempted retraction was not a compliance with the statute, and did not constitute a defense to this action.

What was done in the premises was admissible in evidence, if at all, only in mitigation of damages. The so-called retraction was not a bar to the recovery in this action by the plaintiff of such compensatory damages, if any, as the jury might justly and fairly find from all of the evidence that he had sustained by reason of injury to his reputation by the publication complained of. It was therefore reversible error for the trial court to hold that the attempted retraction was a complete defense to this action, and to direct a verdict accordingly.

The defendant claims that in any event the evidence showed that the plaintiff was entitled to recover only nominal damages; hence the order denying a new trial should not be reversed. Whether he was entitled to any more than nominal damages was a question for the jury.

The plaintiff has exhaustively discussed the constitutionality of the statute. It is unnecessary in this case to reconsider this important question, for, the defendant having failed to show a compliance with the statute as to the publication of a retraction, the ⁴⁶⁰ case stands in this respect precisely as if the statute had never been enacted.

Order reversed, and a new trial granted.

LIBEL—PROVINCE OF COURT AND JURY.—It is for the court to determine whether the subject matter to which the alleged libel relates, the interest in it of the author, or his relations to it, are such as to furnish an excuse; but the question of good faith, belief in the truth of the statements, and the existence of actual malice, must be submitted to the jury: *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717; *Augusta Evening News v. Radford*, 91 Ga. 494, 44 Am. St. Rep. 53. In the absence of doubt or ambiguity of language used, it is the duty of the court to determine and instruct the jury whether or not it is libelous; but when doubt or uncertainty exists, it is the duty of the court to define libel, and leave the jury to determine whether the offense has been proved: *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819.

LIBEL—BURDEN OF PROOF.—If a libelous communication is privileged, the burden is on the plaintiff to prove that it was mali-

ciously made: *Bryan v. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726. Where a defendant to a libel suit pleads justification, he thereby assumes the burden of proof: *Note to Smith v. Smith*, 16 Am. St. Rep. 597.

LIBEL—RETRACTION.—Refusal to retract a libel, or to publish, except as an advertisement to be paid for by the plaintiff, any card or statement expressing belief in his innocence may be received in evidence as tending to establish the existence of malice in fact, when exemplary damages are sought: *Note to McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 341.

STATE v. WAGENER.

[74 MINNESOTA, 518.]

MILITIA—"TROOPS"—"STANDING ARMY."—The active militia of the state, the members of which, when not engaged at stated periods in drilling or training for military duty, pursue their usual vocations subject to call for military duty when public exigencies require it, are neither "troops" within the meaning of article 1, section 10, of the federal constitution, nor a standing army within the meaning of section 14 of the bill of rights of the Minnesota state constitution.

MILITIA—VIOLATION OF MILITARY CODE NOT CRIMINAL OFFENSE.—The rules and regulations of the Minnesota military code are merely disciplinary in their nature, designed to secure higher efficiency in the military service, and a violation of them does not constitute a "criminal offense" within the protection and meaning of constitutional provisions requiring presentment or indictment by a grand jury in order to hold to answer for a criminal offense.

MILITIA—MILITARY CODE—COURT-MARTIAL—CONSTITUTIONAL LAW.—The provisions of a state military code authorizing the trial, in times of peace, of members of the state militia by court-martial for a violation of the reasonable rules and regulations of such code, and their punishment, if found guilty, by fine or imprisonment, are constitutional and valid.

W. L. Kelly, Jr., for the appellant.

G. C. Lambert, for the respondent.

521 MITCHELL, J. The relator, alleged to be an enlisted private in the active militia or national guard of the state of Minnesota, was, pursuant to the provisions of the "Military Code" (Laws 1897, c. 118), arraigned before the regimental court-martial, upon the charges of "absence without leave from regular company drill," in violation of section 27, and "willful disobedience of orders," in violation of section 26, of the code. His trial resulted in his being found guilty of the charges, and sentenced to pay a fine of ten dollars and costs of prosecution, taxed by the court-martial at twenty-five dollars, and, in default

of payment thereof, to be imprisoned in the jail of Ramsey county for twelve days. This sentence was duly approved by the convening authority, and notice thereof served on the relator. He having failed to pay the fine and costs within five days, a warrant of committal was duly issued, under section 59 of the code, and delivered to the respondent, sheriff of Ramsey county, who thereunder took the relator into custody, and imprisoned him in the county jail.

⁵²² Upon the petition of the relator, a writ of habeas corpus was issued out of the district court, directed to the sheriff, who, in obedience to the writ, produced the relator in court, and returned that he held him by virtue of the warrant of commitment issued by the regimental court-martial. At the time of the allowance of the writ of habeas corpus, and in aid thereof, a writ of certiorari was issued to the proper officer of the court-martial, who, in obedience to the writ, produced a full record of the proceedings had and taken therein, upon which the warrant of commitment was issued. The district court denied the relator's petition for his discharge, and remanded him to the custody of the sheriff, to serve out the sentence imposed upon him by the court-martial; and from this order the relator appealed.

It is, of course, elementary that the only questions which can be reviewed on the writ of habeas corpus are whether the court-martial had jurisdiction of the relator, and whether the sentence was one which the court, under the law, could pronounce: *Dynes v. Hoover*, 20 How. 65.

1. It is undisputed that the proceedings of the court-martial were in all respects in accordance with the provisions of the "Military Code"; but the points raised by the relator are: 1. That it does not appear from the record that he was a duly enlisted member of the national guard of the state of Minnesota, so as to render him subject to the jurisdiction of a court-martial; and 2. That the provisions of the Military Code are in violation of sections 2, 4, 6, 7, 8, 12, and 14 of the bill of rights of the constitution of the state, and of section 10 of article 1 of the federal constitution.

All we deem necessary to say upon the first point is that, in our opinion, the evidence was plenary that the relator was a duly enlisted member of the state national guard.

2. Under our Military Code, the active militia or national guard is organized and enrolled for discipline, and not for military service, except in times of insurrection, invasion, and riot. The men comprising it come from the body of the militia of the

state, and, when not engaged at stated periods in drilling or training for military duty, they return to their usual vocations, subject to call when public exigencies require it, but may not be kept in service, like standing ⁵²³ armies, in times of peace. While enrolled as soldiers of the state for the purposes aforesaid, they are neither "troops," within the meaning of section 10 of article 1 of the federal constitution, nor a "standing army," within the meaning of section 14 of the bill of rights in the state constitution: *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213.

But the main reliance of relator's counsel is upon sections 4 and 7 of the bill of rights, the first of which provides that "the right of trial by jury shall remain inviolate," and the second, that "no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia when in actual service in time of war or public danger."

The contention is that a trial by a court-martial in time of peace, resulting in fine or imprisonment, as authorized by the Military Code, is an invasion of the constitutional rights of the citizen, and especially that it deprives him of the right of trial by jury, contrary to the provisions of section 4, and requires him to answer to a criminal offense in a manner which is in contravention of section 7 of the bill of rights. All that is necessary to be said as to the right of trial by jury is that the constitution simply preserves it in cases where it existed previous to its adoption. Courts-martial existed long before the adoption of the constitution, and their existence is impliedly recognized in our own and the constitution of most of the states: *Nixon v. Reeves*, 65 Minn. 159. They are an executive agency, and belong to the executive, and not the judicial, branch of the government: *Winthrop on Military Law*, 52, 53. The course of their proceedings has always been without a jury, save so far as the members of the court perform the functions of both court and jury. Hence it is no objection that, under the Military Code, such courts have no jury, and do not conform their proceedings to those in the ordinary courts of justice. But so far, however, as the constitution imposes any limitations upon the powers of courts-martial, they must be strictly observed; and, as suggested by the learned trial judge, section 7 of the bill of rights may contain some such limitations, but we are satisfied that it contains none which at all affect this case. This section should be read and construed ⁵²⁴ in connection with article 12 of the constitution,

which provides that "it shall be the duty of the legislature to pass such laws for the organization, discipline, and service of the militia of the state as may be deemed necessary."

In our opinion, the fundamental error in the argument of counsel for relator is in assuming that the charges upon which his client is held are criminal offenses, within the meaning of section 7. They are not offenses under any general law of the state, or any municipal ordinance applicable to the public generally, and hence not criminal offenses, even as defined in *State v. West*, 42 Minn. 147. The acts of omission with which the relator was charged were merely violations of military discipline, under the provisions of the Military Code. The rules and regulations of that code do not affect the public generally, but are confined in their application to the national guard or active militia, and are merely designed to secure a higher efficiency in the military service; in other words, they are purely disciplinary in their nature, and have exclusive regard to the special character and relation of the accused, as a member of the active militia of the state. Laws providing for the discipline as well as the organization of the militia of the state are constitutional requirements; and section 7 of the bill of rights is not to be so lightly construed as to impair, if not annul, these mandatory provisions.

Training and drill are essential to the efficiency of the militia for military service in case their services should ever be required; and if, as counsel claims, all the executive branch of the government can do to enforce discipline is to discharge dishonorably those who violate military rules and regulations, then all a member of the active militia has to do to relieve himself from his contract of enlistment is to violate it. As is well said by the trial judge: "Deprive the executive branch of the government of the power to enforce proper military regulations by fine and imprisonment, and that, too, by its own courts-martial, which from time immemorial have exercised this right, and we at once paralyze all efforts to secure proper discipline in the military service, and have little left but a voluntary organization, without cohesive force."

We think that the constitution of every state in the Union has ⁵²⁵ always contained provisions the same or similar to those contained in our bill of rights. In many, if not most, of the states, they have enacted military codes providing for the enforcement of discipline in their organized or active militia by fine and imprisonment, imposed by courts-martial, even in times

of peace. The only exception we have in mind is the state of Missouri, where the power of courts-martial in times of peace is expressly limited to discharging the accused from service. The proceedings of these courts have been frequently assailed, on various grounds, in the civil courts; but, so far as we are advised, in but one other case (*People v. Daniell*, 50 N. Y. 274) did it ever occur to anyone to question the constitutionality of a statute authorizing courts-martial, as a disciplinary measure, to impose fines and imprisonment for violation of military rules and regulations; and, in the case referred to, the point raised was very emphatically overruled.

It is unnecessary at this time to consider what are the limitations upon the nature and extent of the penalty which such courts can impose, but it is very clear that in this case the court did not exceed them.

Judgment affirmed.

CONSTITUTIONAL LAW—POWER OF STATES AS TO MILITIA.—The federal constitution does not confer on Congress unlimited power over the militia of the several states. Its power is restricted to specific objects enumerated, and for all other purposes the militia of the states remain subject to state legislation: *Dunne v. People*, 94 Ill. 120, 34 Am. St. Rep. 213.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LIETMAN v. LIETMAN.

[149 MISSOURI, 112.]

LEGACIES—POWER TO DEDUCT DEBTS OF LEGATEE—STATUTE OF LIMITATIONS.—The probate court has power to deduct the debts of an insolvent legatee from the legacy bequeathed to him by the testator in the distribution of the estate, and in making such deduction it is immaterial whether or not such debts are barred by the statute of limitations.

U. G. Phetzing and W. H. Chiles, for the appellant.

J. E. Burden, for the respondent.

114 **MARSHALL, J.** Appeal from order granting defendant a new trial. We adopt appellant's statement of the case, which is as follows:

"Respondent, John H. Lietman, is a nephew of George H. Lietman, deceased, resides in Pittsburg, Pennsylvania, and never has resided in the state of Missouri.

"In June, 1880, said John H. Lietman executed a promissory note for two thousand dollars, and in May, 1881, one for four thousand dollars, payable to the order of said George H. Lietman, together with interest at the rate of six per cent per annum.

"The two thousand dollar note has two credits indorsed thereon: 'May 24, 1881, paid interest in full, \$120'; 'May 24, 1882, ¹¹⁵ paid interest in full.' The four thousand dollar note has a credit: 'May 1, 1882, paid interest in full.' All of these credits are in the handwriting of said George H. Lietman.

"Among the letters and papers of the said George H. Lietman were found after his death several letters from said John H. Lietman, one dated February 25, 1884, in which is stated that he had inclosed a check for three hundred and sixty dollars to pay interest. This payment is not credited on the notes, but in the calculation was allowed by the executor. Also another letter from said John H. Lietman, dated November 11, 1885, in which he states 'that if he had the money he would pay the interest.'

"In 1882, while on a visit at Pittsburg, Pennsylvania, the said George H. Lietman executed his last will and testament, nominating J. H. Bruning of Pittsburg, Pennsylvania, and W. H. Winkler, of Lexington, Missouri, as executors.

"In 1884, said George H. Lietman returned to Lexington, Missouri, and continued to reside there until his death in 1889. Mr. Winkler alone qualified as executor, and entered upon the discharge of his duties as such executor.

"By the terms of the said will the executor was directed to pay all the rents, income, and profits to the widow of said George H. Lietman during her life. After her death certain legacies were to be paid, ranging from five dollars to four thousand eight hundred dollars. In 1893 the widow died. The executor made an effort to collect the two notes mentioned herein, but found that the maker, this respondent, had become bankrupt in 1885, and is now and has ever since been insolvent. He, however, entered his appearance and was represented by his counsel in the probate court, when the executor, at his final settlement, June 1, 1895, asked and was allowed credit for ten thousand five hundred and ninety dollars, being the amount of principal and interest of the said two John H. Lietman notes as inventoried, the probate court being satisfied that these notes were worthless and uncollectible.

116 "In the said will the said John H. Lietman is named as a legatee, being given four thousand eight hundred dollars, and his pro rata share of the surplus, being about four hundred dollars, amounting altogether to about five thousand two hundred dollars.

"At the May term, 1895, of the Lafayette county probate court, the executor made an attempt to make his final settlement and obtain an order of distribution. The executor held that the said John H. Lietman, being indebted to the estate largely in excess of his legacy, should take nothing, but that his legacy should be credited on his indebtedness, and his share be distributed

among the other heirs. The probate court sustained the executor in this view of the law, and the order of distribution was made upon that basis. To this action of the probate court the said legatee, John H. Lietman, filed his objections and perfected his appeal to the circuit court of Lafayette County. At the August term, 1896, of the circuit court the judgment of the probate court was affirmed. Within the proper time the appellant in the circuit court, now the respondent here, filed his motion for a new trial and to set aside the judgment and finding of the court. This motion was sustained and a new trial granted on the ground of error in the refusal of the first and second instructions asked by said John H. Lietman. To which action of the court in granting a new trial exceptions were saved and appeal perfected to the supreme court."

The instructions refused at the trial, which are assigned as the ground for granting the new trial, are as follows: "1. The court declares the law to be that the probate court is possessed of no chancery or equitable jurisdiction; 2. The probate court of Lafayette county, Missouri, has no jurisdiction to determine the indebtedness of John H. Lietman to the estate of George H. Lietman, deceased, and to set off the amount of such indebtedness against the legacy bequeathed said John H. Lietman by the will of said ¹¹⁷ George H. Lietman, or against said John H. Lietman's distributive share of the estate of said George H. Lietman, in making the order of distribution appealed from in this case." The instructions given were the converse of those refused.

1. The first instruction was properly refused, for while it is true that the probate court is possessed of no chancery or equity jurisdiction (*Estate of Glover*, 127 Mo. 163), it is also true that under article 6, section 34, of the constitution of Missouri, and section 3397 of the Revised Statutes of 1889, passed in pursuance thereto, the probate court has jurisdiction "over all matters pertaining to probate business": *Gentry v. Gentry*, 122 Mo. 222; *Green v. Tittman*, 124 Mo. 378. The matters here in issue can be settled at law in a very simple manner, as hereinafter pointed out, and are "matters pertaining to probate business," and hence the probate court has jurisdiction to try and determine them, and there is no necessity for invoking the powers of a court of chancery.

2. The second instruction asked by defendant, respondent here, is supported by the decision of the St. Louis court of appeals, in *Ford v. Talmage*, 36 Mo. App. 65, and that decision

is in line with the adjudications in Massachusetts and California: *Proctor v. Newhall*, 17 Mass. 81; *Hancock v. Hubbard*, 19 Pick. 167; *Dearborn v. Preston*, 7 Allen, 192; *Estate of Nerac*, 35 Cal. 397, 95 Am. Dec. 111. But the doctrine announced in those cases is not in consonance with the weight of authority in England or America, and is predicated upon erroneous conceptions of the jurisdiction of probate courts in Missouri.

¹¹⁸ The major premise of the syllogism upon which the court of appeals decision is based is that, because probate courts have no equity jurisdiction, they have no power to deduct a debt due the estate by a legatee, from a legacy due the debtor under the will. As herein previously stated, the settlement of such a question does not fall exclusively within the jurisdiction of a court of equity, nor necessarily within that of a court of general common-law jurisdiction. It involves the collection of a debt due the estate, which falls within the duty of the executor or administrator, and the distribution of the estate, which falls within the power and duty of the probate court, especially so under the quoted provision of the constitution of Missouri. Hence the major premise is wrong.

The minor premise of the syllogism is that the indebtedness of the legatee to the estate is not an advancement, and hence cannot be deducted from the legacy, nor can it be treated as a setoff, because there is no mutual indebtedness. In Pennsylvania it is treated as an advancement (*Springer's Appeal*, 29 Pa. St. 208), and the orphan's court is held to have power to deduct the debt from the legacy, but not to enter judgment against the legatee for the excess of the debt over the legacy. In England, the administrator is held to have power to apply the debt toward the payment of the legacy, under the common-law doctrine of retainer, or, as was said by the vice-chancellor, in *Ranking v. Barnard*, 3 Madd. 29, "it is clear, that as against the husband, the executors of the testatrix would have a right to satisfy the legacy [which was to the wife, but which the husband was entitled to at common law] by writing off so much of the debt due from the husband to the estate." In *Courtenay v. Williams*, 3 Hare, 538, it was placed on the doctrine of retainer. The American doctrine places it upon the ground that the debt is already in the hands of the executor as assets collected by being deducted ¹¹⁹ from the legacy, thereby practically enforcing the common-law doctrine of retainer: *Clarke v. Bogardus*, 12 Wend. 67; *Armour v. Kendall*, 15 R. I. 193;

Stagg v. Beekman, 2 Edw. Ch. 89; Brokaw v. Hudson, 27 N. J. Eq. 135; Tinkham v. Smith, 56 Vt. 187; Bowen v. Evans, 70 Iowa, 368; and in the later case of Strong v. Bass, 35 Pa. St. 333.

The minor premise laid down by the St. Louis court of appeals therefore falls also. The conclusion reached by that court, that the only remedy was for the administrator to have the interest of the distributee impounded, in equity, and have it applied to the extinguishment of the debt, being based upon false premises, must also fall, in the light of the direct methods pointed out in the authorities herein cited for reaching the same end, and of the jurisdiction of our probate courts.

In the recent case of Hopkins v. Thompson, 73 Mo. App. 405, the Kansas court of appeals said: "The authorities are quite agreed that an administrator has the right to subject the personal property of his intestate to the payment of a debt due by the heir to the estate in priority and reference to the claims of an assignee of the heir: Streety v. McCurdy, 104 Ala. 501; Fiscus v. Moore, 121 Ind. 556." A fortiori, to the payment of the debt of the heir as against a claim of the heir himself.

Waterman on Setoff, second edition, section 209, says: "The giving of a legacy to a debtor is not an extinguishment of the debt, and the debt may be set off by the executor against the legacy." And the same author, in section 210, happily and tersely states the rule as follows: "The right of the executor or administrator to retain in such cases depends upon the principle that the legatee or distributee 'is not entitled to his legacy or distributive share, while he retains in his own hands a part of a fund out of which that and other legacies or distributive shares ought to be paid, or which were necessary ¹²⁰ to extinguish other claims on that fund.' In other words, the legatee or distributee in such cases seeks to obtain a portion of the fund which the testator or the letters of administration have placed in the hands of the executor or administrator to pay debts and legacies or distributive shares; while such legatee or distributee is himself a debtor to the estate, and, by withholding payment, diminishes the fund to that extent. And it is against conscience that he should receive anything out of the fund without deducting therefrom the amount of that fund which is already in his hands as a debtor to the estate."

In his work on the American Law of Administration, second edition, section 564, Woerner lays down the rule to be: "The indebtedness of a legatee or distributee constitutes assets of the

estate, which it is the executor's or administrator's duty to collect for the benefit of creditors, legatees, and distributees. Hence such indebtedness may be deducted from any legacy or distributive share of the debtor. . . . And where the doctrine of retainer is recognized, the executor or administrator may retain against a legatee or distributee, or the assignee or transferee of such, for any debt due to the deceased, or to the executor or administrator in his fiduciary character. The right of setoff exists whether the legatee or distributee was indebted to the deceased before his death, or contracted a liability to the estate thereafter."

It matters not by what name the proceeding is called, whether retainer, advancement, setoff, or assets in the hands of the legatee, the practical result is the same, and it rests upon wholesome principles of right and justice, which can be administered in probate courts, without the aid of a court of conscience. The reason, necessity, and wisdom of the rule is strikingly illustrated in this case, where an insolvent nonresident legatee seeks to diminish the distributive shares of others, by claiming a part of the estate, while he owes the estate twice as much as his legacy amounts to. It would be ¹²¹ idle to remand the executor to a suit at law or a bill in equity, for the executor cannot go to the domicile of the debtor and maintain a suit, having no extraterritorial capacity to sue (*Scudder v. Ames*, 89 Mo. 522), and the debtor will not come to this state so he can be served. But even if the debt was reduced to judgment, it would not alter the status of the parties in the probate matter. True, the legacy could be impounded in equity and applied on the debt, but there is no reason for circumambulation, when the way is clear and the means are at hand and in the power of the executor and of the probate court.

The cases of *Johnson v. Jones*, 47 Mo. App. 237, and *Cauley v. Truitt*, 63 Mo. App. 356, involved different principles and depended upon the rights of third persons as against those of the legatee, and hence neither those cases nor others of like import relied on by defendant have any bearing upon the questions here involved.

It is wholly immaterial whether the debt of the legatee is barred by limitation or not, the right to write it off against the legacy remains unimpaired by any lapse of time: 2 *Woerner's American Law of Administration*, 2d ed., sec. 564; *Tinkham v. Smith*, 56 Vt. 187.

There is nothing in the case upon which it can successfully

be contended that there was any intention of the testator to release or forgive the debt. Allowing the legacy to remain in the will after the legatee became insolvent and ceased to pay interest can only be construed into being an intention on the testator's part to permit the debt to be extinguished pro tanto. The legacy was very much smaller than the debt, and could only have this effect.

We therefore conclude that the circuit court committed no error in refusing the instructions asked by defendant, and hence it erred in sustaining the defendant's motion for a new trial. The judgment to this effect is reversed and the ¹²² cause remanded to the circuit court with directions to enter judgment on its original finding in favor of the plaintiff, the appellant here.

All concur.

LEGACIES—LIABILITY FOR LEGATEE'S DEBTS.—Legacies may be attached in the hands of the executor for the legatee's debts, if they are a charge upon real estate; but mere personal legacies cannot be attached: *Woodward v. Woodward*, 11 N. J. L. 115, 17 Am. Dec. 462. But a legacy while in the hands of the executor cannot be taken under execution by a judgment creditor of the legatee, where the testatrix in her will declares that the legacy bequeathed by her shall not be seized or levied upon for the debts of such legatee: *Estate of Goe*, 146 Pa. St. 431, 28 Am. St. Rep. 805; *Estate of Beck*, 133 Pa. St. 51, 19 Am. St. Rep. 623. A legacy in the hands of an executor is not subject to foreign attachment for the legatee's debts: *Shewell v. Keen*, 2 Whart. 332, 30 Am. Dec. 266, and see note thereto.

SCHMIDT v. ST. LOUIS RAILROAD COMPANY.

[149 MISSOURI, 269.]

TRIAL—EXAMINATION OF WITNESS—REVERSIBLE ERROR.—The cross-examination of a girl fourteen years old, by asking her confusing questions as to what her testimony has been on former examinations, and the remarks of the court thereon, may be, and in this case were, so unfair as to require a reversal of the judgment on that ground alone.

NEGLIGENCE—ORDINARY CARE.—The term "ordinary care," when used to define the duty of a gripman on a street-car toward a young child just dismissed from school and about to cross in front of his car, means that degree of care which, in the ordinary experience of mankind, must be expected to be exercised toward such child.

NEGLIGENCE—ORDINARY CARE.—Under some circumstances, a very high degree of vigilance is demanded by the requirement of ordinary care. Thus, if the consequences of negligence may probably be serious injury to others, and where the means of avoid-

ing the infliction of such injury are completely within the party's power, ordinary care requires the utmost degree of human vigilance and foresight.

NEGLIGENCE—ORDINARY CARE.—Any failure by one engaged in the pursuit of his own occupation or business to observe precautionary rules or regulations established by competent authority to guard against accidents and prevent injury to others, is, in legal contemplation, a want of ordinary care.

NEGLIGENCE—BURDEN OF PROOF.—If plaintiff declares that defendant was guilty of negligence causing the injury in question, and defendant pleads that plaintiff was guilty of contributory negligence, the burden of proving the defendant's negligence and its consequences is upon the plaintiff, and the burden of proving the plaintiff's contributory negligence is upon the defendant. If such plaintiff's own evidence shows that he was guilty of contributory negligence, the court should take the case from the jury and direct a nonsuit.

NEGLIGENCE—CITY RAILWAY'S RATE OF SPEED.—An ordinance authorizing a city railway company to run its cars at a rate of speed not exceeding twelve miles per hour is not a license to run at that rate under any and all surroundings, and does not relieve the company and its servants in charge of its trains of the duty of holding them in such control that they can stop them in the shortest time and space possible on the first appearance of danger observable by the vigilant watch imposed by such ordinance. If there is a crowd of school children on the street, the gripman in charge of a street-car must so regulate the speed of his car and handle the appliances for its control as one capable of handling with skill such a machine and mindful of his responsibility would do.

TRIAL.—INSTRUCTIONS to the jury that if a witness on different occasions has given evidence on the same subject, and the statements of the witness on one occasion are different from those made on another, and no satisfactory reason is advanced therefor, the jury is justified in disregarding the whole of the witness' testimony as erroneous. The court can go no further than to instruct the jury that, if it believes from the evidence that any witness has willfully sworn falsely as to any material fact, the whole of his testimony may be disregarded.

Sale & Sale, for the appellants.

S. P. Galt, for the respondent.

273 VALLIANT, J. This is an appeal from a judgment upon a verdict for defendant in a suit brought by plaintiffs to recover damages for the death of their daughter, aged nine years, who was run over by a street-car of defendant and killed in St. Louis, November 15, 1893.

The petition alleges that at the time defendant was operating a cable street railroad along Broadway under **274** license from the city, which reserved the right to regulate the running of cars and their rate of speed, and that there was then an ordinance of the city in force which provided: "The conductor and gripman or other person in charge of any street-car shall keep a vigilant watch for persons on foot, especially children, either

on the track or moving toward it, and, on the first appearance of danger to such persons, the car shall be stopped in the shortest space and time possible."

The petition also alleges that plaintiff's child was run over and killed at the corner of Lemp avenue and Broadway by a train of defendant's cars on November 15, 1893, and charges the negligence as follows: "That immediately prior to the happening of the accident, said train was moving north on Broadway, on a down grade, approaching the intersection of Broadway with Lemp avenue, and, while so moving, said train was negligently permitted to run at full speed, with all its brakes thrown off; that while so running and approaching Lemp avenue, the gripman negligently failed to give any warning of the approach of said train to Lemp avenue; that the gripman and conductor, and each of them, negligently failed to keep a vigilant watch, or any watch whatever, for persons moving toward the track, and that but for their negligence in this respect Maggie Schmidt could have been seen approaching the track in time to have prevented the accident."

The defendant denied the negligence alleged, and pleaded contributory negligence on the part of Maggie Schmidt in failing to look or listen for the approaching cars of defendant before attempting to cross the street.

The testimony on the part of the plaintiff tended to show that the accident occurred at the time and place stated, at the hour of noon, at which time the Shepard School, located a block and a half east of Broadway, had just been dismissed for the noon ²⁷⁵ recess, and there were school children on Broadway near where the deceased child attempted to cross the track. The train was going north on Broadway; as it approached Marine avenue, which is the next street south of Lemp avenue, where the accident occurred, there was a lot of school children chasing across Broadway ahead of the train; the gripman rang the bell on approaching Marine, but not on approaching Lemp avenue. The sun was shining and the track was dry. After leaving Marine avenue the train was going on a down grade, at the full speed of the rope, twelve miles an hour, which was the maximum limit of speed fixed by ordinance, and the car struck the child with full force when she was about the middle of the track, the post where the headlight is fastened striking her head, her cap flew back into the aisle of the grip-car; just as the car struck her the brakes were applied, and when it stopped it was found that she had slipped under the life guard,

had been dragged about thirty feet, and was lying with her head wedged against the grip-bar that goes into the slot. The testimony on the part of plaintiff also tended to show that as the train was passing Marine avenue there was a drunken man there near the sidewalk, who attracted the gripman's attention, and the gripman was looking back at this man and continued to do so until the dashboard of the grip-car struck the child.

The testimony on the part of defendant tended to prove that the train was running at full speed, twelve miles an hour; that the gripman was looking ahead; that there was a buggy passing south on the east side of the street, and as the child ran from the sidewalk this buggy obstructed the gripman's view, and he did not see her until she appeared from behind the buggy; that he immediately did his best to stop the car, but it was impossible to do so. In rebuttal, testimony for plaintiff tended to prove that there was no buggy passing as claimed by the gripman.

²⁷⁶ At the instance of plaintiffs, the court gave the following instructions, having first modified all but one of them by inserting the words which appear in italics:

"1. Upon the issue as to whether deceased was guilty of negligence contributing to her death, such as will prevent plaintiffs from recovering in this case, the court instructs you that the law requires all persons situated as deceased Maggie Schmidt was when and before the accident happened to exercise ordinary care and caution to avoid the injury to themselves, and that the absence of such care and caution constitutes negligence. In determining, however, whether the deceased Maggie Schmidt was guilty of such negligence, the jury should take into consideration her age and capacity, since the law requires of a child nine years old only such care and caution as might reasonably be expected of one of her age under similar circumstances. If, therefore, you find that the deceased Maggie Schmidt was using the care that children of her age and capacity usually exercise, or that might reasonably be expected from one of her age and capacity under similar circumstances, then she was not guilty of negligence within the meaning of the law and these instructions. The court further instructs you that the burden of showing that the deceased Maggie Schmidt was guilty of negligence contributing to her death is upon the defendant company.

"2. The jury are instructed that, even if they should find from the evidence that the deceased Maggie Schmidt was negligent in going upon the track of the defendant company, yet

the court further instructs you that such negligence will not of itself prevent a recovery in this case by plaintiffs, provided you further find from the evidence that the gripman, by keeping a vigilant watch for persons moving toward the track, could have seen said Maggie Schmidt approaching the track in time to have prevented the train from running over and killing her. If you find *from the evidence* that said gripman and conductor, or either of them, was not keeping ²⁷⁷ such a vigilant watch, and you further find *from the evidence* that the deceased Maggie Schmidt would have been seen *by said gripman* in a position of danger in time to have avoided running over and killing her, *by the exercise of ordinary care on his part*, then your verdict should be for the plaintiffs, although you should also find that the deceased was guilty of negligence in going upon the track.

“3. The court instructs the jury that it was the duty of defendant’s gripman to sound his gong or bell when approaching Lemp avenue, so as to give notice to persons desiring to cross said street of the approach of the train of cars, and if you find from the evidence that said gripman failed to sound his gong or bell *or give any other warning* when approaching said avenue, and that, but for his failure to sound his gong or bell *or give such warning*, the accident complained of would not have happened, your verdict should be for the plaintiffs, *provided you further find from the evidence that Maggie Schmidt at the time exercised such care for her own safety as could be reasonably expected of a child of her age and capacity.*”

“5. The court instructs the jury that the law requires that the defendant’s servants should be watchful to see that the way is clear in the direction in which the train is moving, and that, where they have reason to anticipate the sudden and unexpected appearance of children upon or approaching the track, they should so manage the grips and brakes of the cars as to be able to stop the cars quickly and readily, should occasion require. If, therefore, under all the circumstances detailed in the evidence, you find that there was reason to anticipate the sudden and unexpected appearance of children upon or approaching the track, at the intersection of Lemp avenue with Broadway, and you further find that the defendant’s servants in charge of its train of cars were not so managing its grip and brakes as to be able to stop said train readily and quickly, should occasion require, and you further ²⁷⁸ find that the death of plaintiff’s daughter was caused by the failure of defendant’s servants to so manage said grip and brakes, then your verdict must be for

the plaintiffs, *provided you further find from the evidence that Maggie Schmidt at the time exercised such care for her own safety as could be reasonably expected of a child of her age and capacity.*"

The court also gave, at the instance of the defendants, several instructions, the first, fifth, sixth, and seventh of which are not complained of. The others are as follows:

"2. The court instructs the jury that it is the duty of persons, before crossing the street upon which cable-cars run, to listen and look for cars that may be approaching, and if they can be heard or seen, and there is any danger from them in attempting to cross the track, then they must stop before reaching the track and let the car pass, and not put themselves in danger from it, and if the jury believe from the evidence that Maggie Schmidt had capacity to know that if she got upon the track in front of and near to the approaching car she might be struck and hurt, and the jury further believe that she could, by the exercise of ordinary care as explained in these instructions, before leaving the pavement or reaching the track, have seen or heard the approaching cars, then it was her duty to stop, and not run upon the track, and your verdict must be for the defendant.

"3. The court instructs the jury that a street railway company is not obliged to stop its cars or slow up because there are persons, adults or children, on the pavement; that the defendant, the St. Louis Railroad Company, had the right to run its train, at Lemp avenue and approaching it, at twelve miles an hour, and the gripman was not required to slow up or stop merely because there were persons on the pavement, and you must not presume any negligence on his part merely from that fact, and if you believe from the evidence that, as he was approaching Lemp avenue and crossing it, he was looking ahead of him down the street, attending to his ²⁷⁹ duties as defined in the instructions, and that while Maggie Schmidt was running from the pavement toward him he saw her as quickly as he could by the exercise of ordinary care on his part, under all the circumstances in evidence, and promptly did his best to stop the train, then the jury will find their verdict in favor of the defendant; and the court further instructs you that if you believe he did not do so, but was negligent, and you also believe from the evidence that Maggie Schmidt was also negligent for one of her age and capacity, as explained in these instructions, in running directly in front of the train and so near to it as she

did, and that she thereby contributed to the accident, then your verdict must be for the defendant.

"4. What constitutes 'ordinary care' as mentioned in these instructions depends on the facts of each particular case. It is such care as a person of ordinary prudence would exercise (according to the usual and general experience of mankind) in the same situation and circumstances as those of the person or persons in this case with reference to whom the term 'ordinary care' is used in these instructions. The omission of such care is negligence in the sense in which that word is used in these instructions."

"8. The court instructs the jury that if they believe from the evidence that any witness, in testifying in this case at any time before this present trial of the case, testified to material facts therein, directly different from the statements made in regard thereto by such witness on this trial, and no good and sufficient reason has been shown why there should be such difference in the testimony of such witness, then the jury are justified in disbelieving the whole or any part of such witness' evidence on this trial. And the court further instructs you that which direction the gripman was looking and what he did as Maggie Schmidt was running from the pavement to the track, and which way he was looking immediately before that, are such material facts."

²⁸⁰ Barring the instructions given by the court, defining "burden of proof" and "preponderance of the evidence," the foregoing are all the instructions given by the court.

The court refused to give instruction No. 4 of plaintiff's refused instructions, which was as follows: "4. The court instructs you that while the defendant company was permitted by ordinance to run its cars, at the point where the accident happened, at a speed not exceeding twelve miles per hour, yet such permission fixed the highest rate of speed at which the defendant company was permitted under any circumstances to run, and did not authorize the defendant company to run at such rate regardless of any and all circumstances and conditions that might exist. If, therefore, you find that the deceased Maggie Schmidt was run over and killed by the defendant at a point on the defendant's track where the defendant's gripman had reason to anticipate the sudden appearance of children or other persons upon the track, and if you further find that defendant, at the time of running over said child, was running its train of cars at a rate of speed which, under the facts and circumstances

shown by the evidence, was careless, negligent, and dangerous, and, in consequence thereof, ran over and killed little Maggie Schmidt, then your verdict should be for the plaintiffs, although you should also find that such rate of speed did not exceed twelve miles per hour."

Exceptions were properly saved to the action of the court in giving the instructions for defendant and in refusing the instructions asked by plaintiffs and in modifying some of plaintiff's instructions and in giving them in this modified form.

1. The plaintiffs' first assignment of error relates to the treatment of one of their witnesses in the manner of the cross-examination, and the comment of the court on the evidence.

²⁸¹ This witness was a little girl who, at the time of the accident, which she witnessed, was eleven years old, at the time of the trial, fourteen. The next day after the accident she was examined as a witness at the coroner's inquest, afterward her deposition was taken, after that there was a partial trial which resulted in a mistrial, in which her testimony was taken in open court, and again on the trial now in review her testimony was given in open court. Her testimony on all of these occasions was taken down and written out, and counsel at the last trial had the transcripts of her three previous examinations before them.

It appeared from the evidence of this little girl that she was in the humbler walks of life—was working out as a servant; and although she was going to school at the time of the accident and was one of the flock of school children turned loose on the streets, yet she had not much education and her condition in life was such as that she would not be expected to have the composure and self-confidence in the august presence of the court that would be expected of one even of her age and sex in more favored walks. She became confused upon the stand, and gave way to her tears. In reading the transcript of her cross-examination one cannot be astonished at either her confusion or her distress. When she was asked concerning the accident her answers were straightforward and without hesitation. But when she was asked, as she frequently was, as to whether or not certain questions were asked and certain answers given on one or more of the former occasions, and whether or not on one former occasion she had been asked certain questions as to whether or not on another former occasion she had been asked certain questions and had made certain answers, she became confused, and hesitated long before answering, sometimes not

answering at all, and frequently, while she was in that confused condition, the question would be asked her, if she answered as suggested, did she tell the truth. Counsel asking these questions had in his ²⁸² hand, and cautioned her that he had the transcript of her former testimony. Running all through the cross-examination were intimations that she was testifying falsely and that some one had told her what to say. This cross-examination was within the latitude that the law permits, because of the impracticability of restricting it, but in this instance it was pressed to the very verge of the privilege.

The contest was a very unequal one; on the one side was one of the most able lawyers and skillful cross-examiners in the state, and on the other was a little girl whose position in life would naturally put her in awe of her surroundings. Under such conditions great unfairness may result, but the remedy is in the power of the trial judge to grant a new trial if, in his judgment, injustice has been wrought. The trial judge holds in his hands more than any other tribune the power to shape the trials of cases to accomplish the ends of justice. One of the chief means at his disposal is the power to grant new trials, and he ought to exercise it whenever, in his judgment, unfair advantage has been obtained at the expense of justice.

It is complained here that the learned trial judge assisted in the cross-examination, added to the confusion of the young witness, and unfavorably commented on her testimony in the hearing of the jury.

It is impossible to photograph the situation on the record, and therefore our view of it is very imperfect; but as no exception was saved as to any of the cross-examination conducted by the court or to any of the court's comments except one, there will be no necessity for our considering any but that one.

After the child had been under cross-examination for a long while, and had apparently become so confused and distressed that she ceased to answer questions, the counsel for the plaintiffs asked her a question, and this occurred: ²⁸³ "Q. Did you have any reason that you know of for not admitting that that was your signature? Defendant's counsel objected to the question. The Court: If she has not answered his question I don't see why you can ask that question. Mr. Sale: I thought she might have a reason. The Court: She answered your questions very promptly on the examination in chief. Mr. Sale: We except to the remarks of the court. The Court: It is the fact. Mr. Sale: If it is a fact it is as patent to the jury as it is to the court."

This was a comment on the evidence, which, in view of the character of the cross-examination, was injurious to the plaintiff's cause. It tended to give the impression to the jury that the witness was willing to testify for one side, but not for the other. This was the plaintiff's only eye-witness to the whole accident. All of her testimony is in the record, including her testimony on the former occasions about which she was so confused, and we have read all of it. There is really no such contrariety of statements on the several occasions as to impeach her veracity. Whenever the counsel for defendant asked her about the occurrence in suit she answered his questions as promptly and with as much ingenuousness as she did the questions of the counsel on the other side. It was only after she had been plied with the compound questions as to what questions had been asked her and what answers she had given on former occasions that she was overcome with confusion and distress.

The plaintiffs in the trial did not get the benefit that they were entitled to have from that witness' testimony, and would be entitled to a reversal of the judgment on that ground alone.

2. The second instruction given for the plaintiffs essays to give the jury to understand that although the plaintiffs' ²⁸⁴ child was herself guilty of negligence which contributed to her death, yet if, by the exercise of the proper care, the gripman would have seen her in time to have averted the accident, and failed to do so, the defendant is liable.

Assuming that that is a correct doctrine, the modifications of the court makes the instruction self-contradictory; in one clause the high degree of care required by the city ordinance is imposed on the gripman, and in the other only ordinary care.

It was the duty of the gripman in this case to have exercised "a vigilant watch for persons on foot, especially children, either on the track or running toward it, and on the first appearance of danger to such persons" to have stopped the car "in the shortest space and time possible." The instruction should have been to the effect that if the gripman, by the exercise of that high degree of care, would have seen the child in time and could have saved it, notwithstanding its own negligence, the defendant would be liable.

It is the placing of the two terms "vigilant watch" and "ordinary care" in juxtaposition, that makes the instruction apparently self-contradictory and misleading. The natural inference to be drawn from its reading is that there is a difference between a vigilant watch in the one instance and ordinary care

in the other. But if the jury had been properly instructed in the meaning of the term "ordinary care," there would really be no conflict and nothing misleading. The demand for ordinary care requires of a man the full performance of his duty under the particular circumstances. In the case at bar, it requires of the gripman the exercise of that high degree of care that the ordinance mentions, and of the child it required that degree of care which, in the ordinary experience of mankind, is to be expected of a girl nine years old just dismissed from school at the noon recess.

The Maryland court of appeals, discussing the subject of ordinary care, have said: "It should not be forgotten, ²⁸⁵ however, that these terms are comparative, and always bear a direct relation to the particular circumstances of each case. The increasing probabilities of danger require a corresponding increase of care and vigilance to avoid it. 'The degree of vigilance which the law exacts, by the requirement of ordinary care, must vary with the probable consequences of negligence, and also with the command of means to avoid injuring others possessed by the person on whom the obligation is imposed. Under some circumstances a very high degree of vigilance is demanded by the requirement of ordinary care. Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight': *Kelsey v. Barney*, 12 N. Y. 425. And it may be said, in general, that any failure by one engaged in the pursuit of his own occupation or business to observe precautionary rules or regulations, established by competent authority, to guard against accidents and prevent injuries to others, is, in legal contemplation, a want of ordinary care": *Philadelphia etc. R. R. Co. v. Kerr*, 25 Md. 531. "He who does what is more than ordinarily dangerous is bound to use more than ordinary care; that is to say, it will require greater care under those circumstances to amount in law to ordinary care than it would if the undertaking were less hazardous": *Beach on Contributory Negligence*, 3d ed., sec. 21.

Therefore, the definition of the term "ordinary care" given in the fourth instruction for defendant was not sufficient under the facts of this case, and for the purpose of enlightening the jury as to the meaning of the term as used in the modification of the plaintiffs' second instruction.

3. The doctrine upon which the instruction disposed of in

the foregoing paragraph is founded, that is, the liability of defendant notwithstanding plaintiff's own negligence ²⁸⁶ under certain circumstances, has been so often declared by the courts of this state, and of other states, that it is thus recognized in this opinion; but the writer has never been able to understand the rationale of it. To attempt to reason it out on the principles on which the law of negligence is based leads to a self-contradiction of those principles, from which the only escape is in an effort to divide negligence into degrees; and to attempt to apply the doctrine to any given case is to attempt to ascertain to what extent the negligence of the one or the other operated to produce the result. Take the case of a man walking on a long high railroad trestle—a very careless and dangerous undertaking. A train comes, and the engineer sees the man in ample time to stop before it reaches him. The engineer knows the man cannot get off the track yet he runs his train on and over him. The law of negligence has nothing to do with that case.

The supreme court of Connecticut have said: "If, in the enjoyment of their lawful rights by two persons at the same time and place, a reasonable care is exercised by both, and an injury accrues to one of them, it must be borne by the suffering party as a providential visitation. If such care is exercised by neither party, and an injury accrues to one of them, he must bear it, for he was himself in fault. And we hold that when the gist of the action is negligence merely, whether gross or slight, the plaintiff is not entitled to recover when his own want of ordinary or reasonable care has essentially contributed to his injury; because he is himself in fault, and because of the difficulty, if not impossibility, of ascertaining in what proportions the parties respectively, by their negligence, have contributed to the production of the injury, and whether it would have been produced at all but by the combined operation of the negligence of both. When the injury is intentional and designed, other considerations apply": *Neal v. Gillett*, 23 Conn. 443.

That is the whole law of contributory negligence in a ²⁸⁷ nutshell. But what is said in this paragraph must be taken as an expression of the opinion of the writer only, and not of the court.

4. When the plaintiff's declaration is that defendant was guilty of negligence, and that negligence caused the injury in question, and the defendant's plea is that the plaintiff was himself guilty of negligence contributing to cause the injury, the

burden of proving the defendant's negligence and its consequence is on the plaintiff, and the burden of proving the plaintiff's negligence and its contribution to the injury is on the defendant. If, in the trial of such a case, the plaintiff's own evidence shows that he was guilty of negligence that contributed to his injury, the court should take the case from the jury. In that case the court does not weigh the plaintiff's evidence of defendant's negligence and pronounce it insufficient, but it takes the plaintiff's evidence of his own negligence at its face value and passes judgment of nonsuit upon it.

But whenever it is a question to be submitted to the jury, then the plaintiff must support his declaration, and the defendant must support his affirmative plea. Therefore, it is wrong to instruct the jury that if they find that the defendant was guilty of the negligence charged and that the negligence caused the injury in question, they should find for the plaintiff, provided they also find that the plaintiff was exercising the degree of care incumbent on him. Because the instruction in that form puts the burden of proof on the plaintiff, not only to establish the guilt of the defendant, but also to establish his own exculpation.

If there has been no evidence tending to show negligence of plaintiff's contributing to the injury, the question should not be submitted to the jury in any shape, but, if there has been such evidence, then the instruction should be in effect that, if the jury find that the defendant was negligent as charged and that negligence caused the injury, they should find for the plaintiff, unless they should also find that the ²⁸⁸ plaintiff was negligent in the particular charged in the plea and that such negligence contributed to the injury.

The difference in the form of expression is the difference in the location of the burden of proof. For this reason the court's modifications of the plaintiff's third and fifth instructions were erroneous.

5. The ordinance in evidence showed that defendant was authorized to run its cars at a rate of speed not exceeding twelve miles an hour. That is not a license to run the cars at the rate of twelve miles an hour under any and all surroundings. It does not relieve the defendant's servants in charge of its trains of the duty of holding them in such control that they can stop them in the shortest time and space possible on the first appearance of danger observable by the vigilant watch the ordinance requires them to keep.

If, when the train in question approached Marine avenue, there was a flock of school children on the street, he should have regulated the speed of his train and handled the appliances for its control, as one capable of handling with skill such a machine and mindful of his responsibility would have done; and, if he failed to do so, the defendant would not be excused from the consequences by the mere fact that he was running the train within the limit of speed allowed by the ordinances. Therefore, the fourth instruction asked by the plaintiff expressed the law as plaintiffs were entitled to have it declared, as far as it went. But, inasmuch as it covered the whole case, it was defective, because it omitted the issue relating to contributory negligence of the deceased child, therefore the court committed no error in refusing it.

6. Instructions are to be understood as applied to the facts of the case. Therefore, when the court gave instruction numbered 3 for defendant, which contains this expression, "that defendant, the St. Louis Railroad Company, had the right to run its train, at Lemp avenue and approaching it, at twelve miles an hour," it meant that the railroad company had the right to do so then and there and under the ²⁸⁹ circumstances that culminated in this accident. The court doubtless did not intend that, but that is what it means, and it was error to have so given it.

The same instruction also in submitting the question of the child's contributory negligence to the jury assumes that she did the act charged, and submits only the question of whether or not in doing so it was to be considered negligence in one of her age and capacity. That was error.

7. The eighth instruction given for defendant was leveled at the little girl Minnie Hartung, and could have been understood as referring to no one else. It is also unsound in the legal proposition stated. It is in effect that if a witness on different occasions has given testimony on the same subject, and the statements of the witness on one occasion are different from those made on another, and no satisfactory reason is advanced for the difference, the jury are justified in disregarding the whole of the witness' testimony.

The farthest the court can go in that direction without trenching on the provision of the jury, is to instruct them in effect that, if they believe from the evidence that any witness has willfully sworn falsely as to any material fact in the case, they may, if they see fit, for that reason disregard the whole of that witness' testimony. But even in the giving of that instruction

the court should act with caution. It is not to be given in every case, and should never be given unless the trial judge strongly suspects that willful false swearing has been done in the case. The giving of that instruction in this case was error.

The judgment of the circuit court is reversed, and the cause remanded to be retried in conformity to the law herein expressed as the opinion of the court.

Brace, P. J., concurs in the result, and in paragraphs 1 and 7.

Robinson, J., concurs.

Marshall, J., concurs in paragraph 7, and dissents from the rest.

WITNESSES.—THE EXTENT TO WHICH CROSS-EXAMINATION shall be conducted is largely in the discretion of the trial court, and such discretion will not be interfered with unless it clearly appears that it was abused to the injury of the party complaining: *White Sewing Machine Co. v. Gordon*, 124 Ind. 495, 19 Am. St. Rep. 109. The extent to which a cross-examination may be carried rests in the sound discretion of the court; and the exercise of such discretion, if not abused, is not reviewable upon appeal: *Note to White Sewing Machine Co. v. Gordon*, 19 Am. St. Rep. 112.

NEGLIGENCE.—ORDINARY CARE IS that degree of care which people of ordinarily prudent habits could be reasonably expected to exercise under the circumstances of a given case: *Driscoll v. Market Street etc. Ry. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203, and note thereto. Ordinary care is such as a person of ordinary prudence and caution, according to the standard of the usual and general experience of mankind, would exercise in the same situation and circumstances as those of the person whose conduct is that in question in a given case: *Tetherow v. St. Joseph etc. Ry. Co.*, 98 Mo. 74, 14 Am. St. Rep. 617. The age and situation of the injured party are proper to be considered by the jury in determining the question of negligence; and a boy of eleven years is entitled to have more care exercised toward him by a railroad company than an abler and stronger person: *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445, 98 Am. Dec. 61. The degree of care required in order to avoid liability for negligence must be proportionated to the nature of the act performed, the place where performed, and the extent of danger and injury likely to result from a failure to use due care: *Houston etc. Ry. Co. v. Boozer*, 70 Tex. 530, 8 Am. St. Rep. 615.

THE BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE of the plaintiff rests upon the defendant: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28; although plaintiff's evidence sometimes relieves from the necessity of discharging it: *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47. But in Connecticut the burden of proof is on the plaintiff to show the use of ordinary care upon his part: *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. Rep. 225. Contributory negligence, when pleaded alone, is an admission of negligence on the part of the defendant; but, when it is interposed with the plea of not guilty, the effect of the double defense is, that all negligence on the part of the defendant is denied, and the burden of proof is thrown upon the plaintiff: *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708, 13 Am. St. Rep. 84.

NEGLIGENCE, CONTRIBUTORY—NONSUIT.—Only in rare cases is the court justified in withdrawing the question of contributory negligence from the jury. Proof of contributory negligence must be clear and decisive to warrant a nonsuit on that ground: *Note to Hall v. Ogden City etc. Ry. Co.*, 57 Am. St. Rep. 735.

WITNESSES.—CREDIBILITY OF TESTIMONY is a question for the jury, and it is not within the province of the court to discredit testimony in its charge to the jury: *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470. Since it lies entirely with the jury to determine what weight should be given to the testimony of a witness who is shown to have made contradictory statements, the court may properly refuse an instruction to the effect that proof of the making of such statements goes to his credibility: *Springfield v. State*, 96 Ala. 81, 38 Am. St. Rep. 85.

STATE v. GUILD.

[149 MISSOURI, 370.]

PROSECUTION FOR CRIME—AGREEMENT TO FORBEAR.—An agreement between a prosecuting officer and an accomplice in crime that, upon the latter's testifying against his accomplice, the prosecution against him is to be discharged cannot be enforced and is no bar to such prosecution.

RECEIVING STOLEN GOODS.—INDICTMENTS for receiving stolen goods need not allege the thief's name nor who stole the goods.

RECEIVING STOLEN GOODS—GUILTY KNOWLEDGE. Being present where stolen property is concealed, knowing it to be stolen and keeping silent and refusing to give information to officers searching therefor, or attempting to escape, is, when unexplained, conduct sufficient to warrant a conviction of receiving stolen goods knowing them to have been stolen.

RECEIVING STOLEN GOODS—POSSESSION AS EVIDENCE.—Recent possession of stolen property is evidence either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the circumstances, and, unexplained, is sufficient to warrant a conviction.

RECEIVING STOLEN PROPERTY—POSSESSION—IDENTIFICATION.—If, in a prosecution for receiving stolen goods, it is shown that a quantity of flour, some dry goods, and a bag containing seventy pounds of coffee were stolen, and that an empty coffee bag, some flour, and the dry goods were found in defendant's possession, the jury have the right to conclude that the flour was the stolen property and that the bag contained coffee when it was received by the defendant.

C. D. Jamison, H. B. Perry, and G. Wheeling, for the appellant.

E. C. Crow, attorney general, and K. B. Stone, for the state.

374 SHERWOOD, J. Defendant was indicted for receiving and concealing stolen property. Charging part of indictment the following: "Charge that W. C. Guild, on the ——— day of April, 1898, at and in the county of Dent and state of Missouri, did then and there, two certain dark colored overcoats, one small overcoat, one lady's brown jacket, one lady's blue jacket, silk lined, one lady's black jacket, one sack of roasted coffee, one hundred pounds of flour, all of the said property being of the aggregate value of fifty-five dollars and eighty cents of the goods and chattels of the Dent County Mercantile Company, a corporation, then lately before feloniously stolen, taken, and carried away, unlawfully and feloniously did receive and conceal, he, the said W. C. Guild, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away as aforesaid; against the peace and dignity of the state." Tried, defendant was convicted and awarded five years in the penitentiary. This prosecution is grounded on section 3553 of the Revised Statutes of 1889.

Before the trial began, the defendant filed a plea in abatement to the further prosecution of the charge contained in the indictment, which plea, omitting caption, is the following: "Defendant states that he is entitled to his discharge from the indictment in this cause for the following reasons: Because the state of Missouri, through her attorney who prosecutes the pleas of the state, promised and agreed **375** to discharge the defendant from said prosecution on the consideration that defendant testify before the grand jury in the case of the state against Sprague, which testimony defendant gave. Because said attorney promised to discharge him from said cause if he would testify on the trial of the cause of the state against Sprague, with which agreement defendant complied and testified."

Defendant offered to prove the truth of his plea, but this was denied him and his plea stricken from the files, on the ground that it presented no defense to the charge; whereupon defendant excepted.

1. Touching such matters, Blackstone says: "It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to jail, to admit some one of their accomplices to become a witness (or, as is generally termed, king's evidence) against his fellows, upon an implied confidence, which the judges of jail delivery have usually countenanced and adopted, that, if such accomplice makes a full and complete discovery of that and all other felonies to which he is examined by

the magistrate, and afterward gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offense of the same degree": 4 Blackstone's Commentaries, 330.

Bishop says: "As to the nature of the agreement with the accomplice, doubtless ordinarily the mere fact that he testifies for the government, freely and fully acknowledging his own participation in the offense, implies the common equitable understanding, not amounting to an agreement enforceable at law, that a pardon shall follow. But where the testifying was not with the concurrence of the state's attorney, or arranged for by any other authorized person, or even under the expectation of a pardon, it was held not to have this effect. The substance of the implied or expressed understanding is, that the accomplice shall honestly and fairly ³⁷⁶ disclose all he knows, including his own guilt, and even confidential communications to attorneys; thereupon, if his testimony is corrupt, or if otherwise his disclosures are only partial, he gains nothing, and his confessions may be used against him. If he does his part, his claim to consideration will not be impaired should the defendant be acquitted. Since he cannot plead his acquired right in bar, if the attorney for the state refuses to recognize it, the court can only continue the cause to permit him to apply to the executive for pardon": 1 Bishop's New Criminal Procedure, sec. 1164.

In this state the executive cannot pardon, etc., until after conviction (Const., art. 5, sec. 8), and consequently it would be useless for the trial court to continue the cause in order for something to occur which, under our constitution, could not occur.

This equitable understanding or implied agreement made with an accomplice is, as is also elsewhere shown, incapable of enforcement, and the accomplice cannot plead such agreement, etc., in bar, nor avail himself of it, because it is merely an equitable title to the mercy of the executive: 3 Rice on Evidence, 505. This equitable title to pardon in cases of this sort, where a party without any agreement to that effect, has turned state's evidence, has been recognized from a very early period in English criminal law, and this precedent has been unvaryingly followed by our American courts. An exception to the prevalence of this principle it seems occurred in *People v. Faulkner* (not reported), where the district attorney, moved by the clamor of the multitude, refused to nolle pros the indictment against the accomplice and he was imprisoned. "Satisfactory evidence of these facts

having been brought to the attention of the attorney general of the United States, and through him to President Harrison, the latter issued an unconditional pardon to the accomplice, 'because I am advised that the United States, having used the prisoner against one jointly indicted (his brother), ³⁷⁷ an equitable right to clemency under the decision of the supreme court is established. This right, if it can be called such, could not be enforced, but as it has become a settled rule in criminal procedure, I very reluctantly act upon it': Cited in 3 Rice on Evidence, 518, 519.

Under the foregoing authorities, no error occurred in the ruling of the trial court.

2. Defendant was the owner and operator of a picture gallery in Salem, Dent county, Missouri. He also practiced dentistry at the same locality. Prior to the time of the commission of the offense with which he stands charged, he had purchased some two hundred and fifty dollars of merchandise from C. S. Minor, circuit clerk of Dent county.

The store of the Dent County Mercantile Company was broken open on the night of the 13th or early in the morning of the 14th of April, 1898, and several hundred dollars' worth of goods were removed therefrom. A day or so afterward these goods were found by the owners, and identified, in the gallery of Guild hid away. On the evening the goods were found, the sheriff and one of the owners of the store went to Guild's house in Salem and told him they wanted to search his gallery. He went with them to it and unlocked the door, and, when they went upstairs to search, he slipped out of the building and attempted to escape, but was caught and brought back and put in jail. When caught by Young, Guild said, "I want to go on; that thing is going to ruin me."

It is asserted by counsel for defendant that there is "no evidence that another stole the property," but this assertion is without support in the record, in which there is abundant evidence that the property was stolen prior to its felonious reception by Guild. And there was no manner of necessity for alleging who was the thief: Bishop's Directions and Forms, sec. 916; 2 Bishop's New Criminal Procedure, sec. 982. And the above ³⁷⁸ recited facts show that defendant had knowledge of the larceny. His conduct is inconsistent with any other rational theory (People v. Connor, 68 Hun, 78); and it has even been ruled that, being present where stolen property is concealed, knowing it to be stolen, and keeping silent and refusing to give

information to officers searching for the same, is, when unexplained, conduct sufficient to warrant a conviction, notwithstanding the evidence does not show that the accused was in the physical possession of the property secreted: *State v. St. Clair*, 17 Iowa, 149. To like effect is *State v. Turner*, 19 Iowa, 144.

3. Indeed, the authorities go farther than what has been already stated. Bishop says: "Possession of the goods may, as in larceny, and under the like rules and with the like effect, be evidence against the receiver": 2 Bishop's New Criminal Procedure, sec. 989. Elsewhere the learned author observes that in receiving stolen goods, possession is equally admissible as in simple larceny: 2 Bishop's New Criminal Procedure, sec. 747.

In *Regina v. Matthews*, 1 Den. C. C. 610, where the indictment was for receiving stolen goods, Coleridge, J., observed: "He bought the goods of a thief, and they are found in his house. Prima facie, if stolen goods are found in a man's house, he, not being the thief, is a receiver." In some cases the crime of theft so shades into that of receiving stolen goods that it is difficult to distinguish what is the crime committed. A case decided in 1864, a case which was determined after great consideration, a reserved case gives apt illustration to this view; it is *Regina v. Langmead*, 1 Leigh & C. 427, where the defendant was indicted both for stealing and for receiving, and there it was determined that recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the other circumstances of the case. Where the prisoner was found in the recent possession of some stolen sheep, of 379 which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself, it was held that there was evidence for the jury that he received them knowing them to have been stolen. In that case, Pollock, C. B., remarked: "The distinction taken by Mr. Carter between a charge of stealing and one of receiving, with reference to the effect of evidence of recent possession, is not the law of England. If no other person is involved in the transaction forming the subject of the inquiry, and the whole of the case against the prisoner is that he was found in the possession of the stolen property, the evidence would, no doubt, point to a case of stealing rather than a case of receiving, but in every case, except, indeed where the possession is so recent that it is impossible for anyone else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen prop-

erty stole it himself or received it from someone else. If, as I have said, there is no other evidence, the jury will probably consider with reason that the prisoner stole the property; but, if there is other evidence which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them to be the more probable solution."

Goldstein v. People, 82 N. Y. 231, was a case where, upon the trial of an indictment for receiving stolen goods with knowledge, the court charged "that the possession of stolen goods, immediately after the larceny, if under peculiar and suspicious circumstances, when there is evidence tending to show that some other person or persons stole the property, such possession, not being satisfactorily explained, would warrant" a conviction. Held, no error. See, also, to same point Regina v. McMahon, 13 Cox C. C. 275.

And it is announced in Roscoe's Criminal Evidence, following Regina v. Langmead, 1 Leigh & C. 427, that: "Recent possession of stolen property may, according to circumstances, ³⁸⁰ support either the presumption that the prisoner stole the property or the presumption that he received it knowing it to be stolen": 2 Roscoe's Criminal Evidence, 8th ed., 1133.

Under these authorities there is no trouble in finding ample evidence on which to find defendant guilty. Goods are stolen, and, within a few hours thereafter, he is in possession of the fruits of the larceny. He attempts no explanation, and when he finds that everything, so far as he is concerned, is lost, seeks safety in flight. In this state it has always been the law that recent possession of stolen property is presumptive evidence of guilt, and we discover no reason why the same presumption should not hold as to the recent possession of property received and concealed. Adhering, therefore, to the foregoing authorities, we shall overrule State v. Bulla, 89 Mo. 595, where the point in question was but lightly considered.

4. But it is urged that there was no evidence to show that the property found in defendant's possession and charged to have been received and concealed was equal in value to thirty dollars. In reply to this contention it may be said by way of quotation: "The possession of a part of the stolen goods of the smallest value, in connection with other circumstances, might clearly fix the guilt of stealing all of the goods upon defendant": State v. Barker, 64 Mo. 285. Under authorities heretofore quoted, the same principle is applicable to the case at bar. Here the sack of

coffee, branded in two places with the initials of the Dent County Mercantile Company, was found, along with the other stolen goods, in defendant's gallery and possession, and concealed, and in the sack were a few grains of roasted coffee such as the sack had been filled with. From that sack had been taken and placed in a bin in the store of that company some thirty to fifty pounds of coffee to deal out to customers, leaving seventy to ninety pounds of coffee in the sack, which, at twenty cents per pound, its retail price, would amount to from sixteen dollars ³⁸¹ to twenty dollars, and this sum, with the other articles mentioned in the indictment and proven to have been stolen and to have been found in defendant's possession, saying nothing about the flour, would have amounted to thirty dollars and upward. It would be a very unreasonable inference to draw about the coffee, that pains were taken to empty the sack of the coffee in the store and then carry the empty sack and carefully deposit it with defendant. The jury did not draw such a foolish inference, and we will not draw it for them. As to the flour, although it could not be positively identified, yet it was sufficient to go to the jury that the witnesses stated it "looked like the flour" stolen from the company: *State v. Babb*, 76 Mo. 505. Nor in this connection is it to be forgotten that the flour was amongst a lot of goods proven to have been stolen from the company. The jury doubtless drew the only proper and legitimate inference from the place and the surroundings in which the flour was found. Besides, it would seem that to this flour might well be applied the maxim "*noscitur a sociis*." In short, it would seem that articles can be known equally as well from the company they keep as words: *McNichol v. United States etc. Agency*, 74 Mo. 463.

Finding no error in the record we affirm the judgment.

All concur.

STATE'S EVIDENCE—AGREEMENT TO TURN.—The prosecuting officer may, with the consent of the court, enter into an agreement with an accomplice that, if he will testify fully and fairly in a prosecution against his accomplice in guilt, he shall not be prosecuted for the same offense, and upon so testifying he is entitled to such protection as the law affords; yet the weight of authority upholds the proposition that if such an agreement is made with the prosecuting attorney alone, without the consent or advice of the court, it is of no effect as a protection to the accomplice if he is afterward placed on trial in violation thereof: *Note to Camron v. State*, 40 Am. St. Rep. 768.

AN INDICTMENT FOR RECEIVING STOLEN GOODS need not allege the name of the person from whom such goods were received, nor that his name is unknown: *State v. Hazard*, 2 R. I. 474, 60 Am. Dec. 96; *Huggins v. People*, 135 Ill. 243, 25 Am. St. Rep. 357.

RECEIVING STOLEN GOODS—WHAT AMOUNTS TO.—At common law, the receiver of stolen goods is indictable for the misprision of knowing the thief and neglecting to prosecute him. There must be a guilty knowledge on the part of the defendant that the goods were stolen; and the essence of the crime is, that the receipt of the property is accompanied by a fraudulent intent to deprive the true owner thereof: Note to Wright v. State, 26 Am. Dec. 261.

POSSESSION OF STOLEN PROPERTY—EVIDENCE.—The bare fact that an accused received stolen goods is not sufficient to warrant a conviction for receiving stolen property: Castleberry v. State, 35 Tex. Cr. Rep. 382, 60 Am. St. Rep. 53. It is error to instruct a jury that the possession of stolen property is a circumstance sufficient to warrant the presumption of guilt on the part of the person having such possession, if the evidence shows that such possession was recent, personal, exclusive, and unexplained. The instructions upon this subject should be that such possession is a mere circumstance to be considered by the jury in connection with other evidence in the case in determining the issue of the defendant's guilt: Cooper v. State, 29 Tex. App. 8, 25 Am. St. Rep. 712, and note thereto. Possession of stolen property as evidence of larceny is the subject of an extended note to Hunt v. Commonwealth, 70 Am. Dec. 447-452.

STATE v. CROWELL.

[149 MISSOURI, 391.]

ROBBERY—INSTRUCTIONS.—Under a statute providing that robbery may be committed against a person "by violence to his person, or by putting him in fear of some immediate injury to his person," where the indictment alleges a robbery from a person by putting him in fear, it is error to instruct the jury to find the accused guilty if he committed robbery by force and violence to the person.

ALIBI—INSTRUCTION—DISPARAGING.—It is error to instruct the jury "that, though an alibi may be a well-worn defense, yet it is a legal one, to the benefit of which the defendant is entitled" as the court has no right to disparage such defense, or refer to it in a slighting or sneering manner.

J. S. Davis and I. V. McPherson, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

394 SHERWOOD, J. Defendant was indicted for robbery in the first degree, convicted, and his punishment assessed at five years' imprisonment in the penitentiary. There was testimony to warrant the verdict.

1. The first instruction given at the instance of the state, was this: "The court instructs the jury that if you find and believe from the evidence in this case, beyond a reasonable doubt, that

at the county of Barry in the state of Missouri, at any time, within three years next before the finding of the indictment herein, to wit, on the twenty-first day of October, A. D. 1897, the defendant, Edward Crowell, either alone or with another, in and upon witness, J. A. Roller, did make an assault and any money of any amount or any value whatever of the property of witness, J. A. Roller, from the person and against the will of said J. A. Roller, then and there, by force and violence to the person of said J. A. Roller, did rob, steal, take, and carry away, with a felonious intent to deprive the owner of his property and to convert it to a use other than that of the owner or without his consent, and without any honest claim to it on the part of the taker, you will find the defendant guilty as charged in the indictment, to wit, of robbery in the first degree and assess his punishment at imprisonment in the penitentiary for a term of not less than five years."

The following is the section under which the indictment is drawn: "Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his ³⁹⁵ person, shall be adjudged guilty of robbery in the first degree": Rev. Stats. 1889, sec. 3530.

It will be noted that under this section robbery in the first degree may be perpetrated in either of two ways: 1. By violence to the person; or 2. By putting such person in fear of some immediate injury to his person. The statute is in the disjunctive: State v. Broderick, 59 Mo. 318; State v. Stinson, 124 Mo. 447.

The indictment in this instance charges: "In and upon one James A. Roller, unlawfully and feloniously did make and assault, and forty-seven dollars and eighty-five cents, good and lawful money of the United States of the value of forty-seven dollars and eighty-five cents, the money and property of the said James A. Roller, in the presence and against the will of the said James A. Roller, then and there by putting said James A. Roller in fear of some immediate injury to his person, feloniously did rob, steal, take, and carry away, against the peace and dignity of the state."

So that while the indictment counts on putting Roller in fear of some immediate injury to his person, the instruction quoted counts on force and violence to the person of Roller. There is, therefore, a marked difference between the charge in the indict-

ment and the instruction mentioned; the former bottomed on fear, the latter on violence.

It is true that if the fact be laid to be done violently and against the will, the law in odium spoliatoris will presume fear (State v. Stinson, 124 Mo. 447; State v. Lawler, 130 Mo. 366, 51 Am. St. Rep. 575); yet it does not thence follow that if you charge fear, that the law will presume violence.

The proper exception was saved to giving the instruction referred to, and the same ground was urged in the motion for a new trial, as appears in the brief filed on behalf of the state.

2. Instruction No. 5 given on behalf of the state was also excepted to by defendant, and such exception preserved ³⁹⁶ in the motion for a new trial. That instruction reads: "The court instructs the jury that though an alibi may be a well-worn defense, yet it is a legal one, to the benefit of which the defendant is entitled," etc. There was error in giving this instruction, as the court is not permitted to disparage the defense of an alibi or to refer to it in a slighting or sneering manner; evidence in regard to an alibi is to be tested and treated just like evidence offered in support of any other defense, insanity, self-defense, etc.: 1 Bishop's New Criminal Procedure, sec. 1062; Sater v. State, 56 Ind. 378; Walker v. State, 37 Tex. 366; Albin v. State, 63 Ind. 598; State v. Gong, 16 Or. 534; 11 Ency. of Pl. & Pr. 360 et seq., and cases cited.

3. Other points might be commented upon, but it is deemed unnecessary to so do, as the errors complained of may not again occur.

For the errors aforesaid, the judgment is reversed and the cause remanded.

All concur.

ALIBI—INSTRUCTIONS HOSTILE TO DEFENSE OF.—There is an inclination on the part of judges in charging juries to give warning as to the character of certain defenses, and the means sometimes employed to support them. The defense of alibi is a familiar illustration of this. But whenever an instruction has been given which clearly casts discredit upon the defense of alibi, and it appears possible that it could have prejudiced the accused, the appellate court will grant a new trial. The courts have even condemned remarks upon this defense, which, while not discrediting it in express terms, have implied that the judge did not regard it with favor: Note to Sharp v. State, 14 Am. St. Rep. 41, 43.

ROBBERY—INSTRUCTIONS.—An instruction that, "to constitute robbery, the person robbed must have first been put in fear of his person or property," is not quite full enough. If the goods be taken either by violence or by putting the owner in fear, it is sufficient to render the felonious taking a robbery: McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93.

THOMAS v. THOMAS.

[149 MISSOURI, 426.]

WILLS—DEVISE TO CLASS—TIME OF DISTRIBUTION.

If a legacy is given by will to a class of individuals in general terms, and no period is fixed for the distribution, such time is the death of the testator. Under this rule, all of such class born or begotten prior to, and in esse at the time of, the death of the testator are entitled to share in the distribution, but those living at the execution of the will who die before the testator are excluded.

WILLS—DEVISE TO CLASS—DEFERRED DISTRIBUTION.—If a legacy is given to a class of individuals, and distribution is, by the terms of the will, deferred to some time after the testator's death, the gift embraces not only all the members of the class living at the death of the testator, but also all those who shall subsequently come into existence and be living at the time designated for the distribution.

WILLS—DEVISE TO CLASS—PRESENT BEQUEST.—If a devise to a class is a present bequest, the beneficiaries who are in esse at the death of the testator take vested interests in the fund, but subject to open and let in after-born members of such class who shall come into being before the time appointed for distribution.

WILLS—DEVISE TO CLASS—PERIOD OF DISTRIBUTION.—If the distribution of a devise to a class is postponed by the terms of the will until the attainment of a given age by the members of such class, the legacy applies only to those who are living at the death of the testator and who shall come into existence before the first of such class attains the age named, this being the period when the fund is first distributable with respect to any member of such class.

WILLS—DEVISE TO CLASS—RIGHTS OF AFTER-BORN CHILDREN.—If, under the terms of a will, the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interests in their shares, subject to the distribution of such shares as the members of the class are increased by future births, and, on the death of any of the children prior to the period for the distribution, their shares go to their respective representatives.

WILLS—DEVISE TO A CLASS—TIME OF DISTRIBUTION. If a will provides that the descendants of the testator shall be paid their shares as each arrives at the age of majority, and then devises to the six children of the testator's son one undivided third of the residue of the testator's estate, and, "should any of these children die unmarried and without issue, or any other children be born to my said son, I will that all of his children divide equally, share and share alike, the said one-third of my estate," such will creates a present vested estate in such of such son's children as were living at the death of the testator subject to let in after-born children, but fixes the period of distribution at the age of majority of the oldest child. Hence, all of such son's children who came into existence before that time are entitled to share in the distribution, but any who were born after such period are excluded from such distribution.

O. D. Jones, for the appellant.

H. F. Millian and Campbell & Campbell, for the respondents.

429 GANTT, P. J. This is an appeal from a judgment sustaining a demurrer to plaintiff's petition, which was filed in the circuit court of Adair county, January 5, 1897. The petition is as follows:

"Plaintiff for his amended petition states that he is an infant under the age of twenty-one years, and that David Nelson Thomas has been, by the probate court of Adair county, Missouri, duly appointed curator of his estate, and is legally qualified as such, and that the said David Nelson Thomas is his father, and is also the father of defendants; that defendants, Edna Thomas, Milton Thomas, and Ethel Thomas, are infants, and that Elizabeth Thomas has been by the probate court of Adair county, Missouri, duly appointed curator of their estates, and is legally qualified as such.

"Plaintiff for his cause of action says that on or about August 10, 1885, his paternal grandfather, John Thomas, departed this life in the state of California, testate, leaving **430** his last will and testament bearing date of July 4, 1882, the instrument bearing date hereto attached and marked Exhibit 'A,' which said instrument is made a part of this petition.

"Plaintiff says that said will was admitted to probate in the supreme court of Los Angeles county, state of California, and letters testamentary, with will annexed, were granted to Milton Thomas and H. S. Parcels, of Los Angeles county, California. Plaintiff says that the ——— clause in said will is as follows, to wit: 'I have heretofore given large amounts to each of my children, and consider it advisable to leave the balance of my estate to my relatives and descendants hereinafter named, to be paid to each upon his or her reaching his or her majority.' An after-clause in said will is as follows, to wit: 'I give to the six children of my son, David Nelson Thomas, and his wife, Elizabeth, one undivided one-third of the residue of my estate. Should any of these children die unmarried and without issue, or any other children be born to my said son, I will that all of his children divide equally, share and share alike, the said one-third of my estate.' Plaintiff says that distribution and partition of the estate of the said John Thomas has been made, but without any provision being made for carrying out the trust created by said will, or preserving and protecting the property of said estate. Plaintiff states that five of the defendants, to wit, Eugene D. Thomas, Ella M. Thomas, Vida Thomas, Edna

Thomas, and Milton Thomas, were living at the date of the execution of said will and were a part of the six children of David Nelson Thomas referred to in said will. That Ethel Thomas, one of the defendants, was born after the execution of said will. That Nelson Thomas, one of the children of David Nelson Thomas living at the execution of said will, died on or about July, 1885. That plaintiff has been born since the execution of said will, and since the distribution ⁴³¹ and partition of said estate, to wit, on the ——— day of ———, 1896.

“Plaintiff says that at the date of the execution of said will the said David Nelson Thomas was forty-five years of age; that Milton Thomas, son of testator, was sixty years of age; that Sarah Ellen Parcels, daughter of testator, had departed this life, she having died before the execution of said will. Plaintiff further says that at the time of testator’s death the said John Thomas was the owner of a large amount of real estate. That part of said real estate was situated in the state of California and part of said real estate was situated in Adair county, Missouri. That there has been partition made of all said real estate, and a one-third part thereof set off as the share of the children of the said David Nelson Thomas. The share of the Missouri real estate so set off for the said children is described as follows, to wit:

“The northwest one-fourth of the northeast one-fourth of section 9, township 62, range 15 west. Also lots 1 and 2, block 11, city of Kirksville, Adair county, Missouri. That the value of said Missouri real estate, so set off, is about ten thousand dollars. That defendants have sold part, if not all, of the real estate situated in California and set off as the share of the children of David Nelson Thomas, and the proceeds thereof, amounting to about eighteen thousand dollars, are in the hands of defendants.

“Plaintiff further states that under and by virtue of the provisions of said will he is entitled to share equally with defendants in the one-third part of the residue of the estate of the said John Thomas, deceased, devised and bequeathed to all the children of David Nelson Thomas, and in the property hereinbefore described and set off as the share of said children, and the proceeds thereof now in the possession of the defendants. Plaintiff further says that possibility of issue is not yet extinct in the said David Nelson Thomas, and that ⁴³² should any children be hereafter born to the said David Nelson Thomas said children will be entitled to share equally with plaintiff and defendants in

the said one-third of the residue of said estate. Plaintiff further says that upon the death of the said John Thomas, and upon the distribution and partition the defendants took the one-third of the residue of said estate, with trust attached in favor of any after-born children of the said David Nelson Thomas. That defendants are wasting and mismanaging said property; that they have mortgaged a part of said Adair county lands; that they have attempted to dispose of the same; that defendants deny the trust or plaintiff's rights to share in said property or the right of any child or children, which may hereafter be born to the said David Nelson Thomas; that plaintiff has no adequate remedy at law. Wherefore, the plaintiff prays the court to declare a trust in favor of plaintiff and any children hereafter born to the said David Nelson Thomas; to appoint some suitable and discreet person as trustee to take charge of and manage said land property, until in the course of events the shares of takers is determined; to order defendants to pay into the court all moneys and funds received from said estate; and for all orders necessary to preserve said estate and property, and to carry out the provisions of said will, and for general relief."

Defendants demurred to this petition for the reason that it did not state facts sufficient to constitute a cause of action, and because upon the facts alleged plaintiff could take nothing under said will.

Upon the hearing of the demurrer the record states: "And for the purposes of said demurrer the following agreed statement was made by the parties to be considered, as if stated in the petition, to wit: 'That at the date of the execution of the will of John Thomas and the codicil thereto, Milton Thomas, testator's oldest son, was a man of large means. That Laura and Mary Thomas, daughters of said ⁴³³ Milton Thomas and legatees under said will, had reached their majority. That David N. Thomas was the youngest child of testator and was shiftless, intemperate, and of uncertain habits and possessed little or no property. That the persons mentioned and provided for in said will composed all of testator's descendants at the time of making the said will. That three of the six children of David N. Thomas, who were living at the death of the testator, had reached their majority before the birth of plaintiff. That in 1889 Elizabeth Thomas was divorced from David N. Thomas and was awarded the custody of their six children. And in 1893 David N. Thomas was remarried, the plaintiff herein being a child of said second marriage. That Elizabeth, the first wife of

David N. Thomas, was born in the year 1846. That in considering the demurrer the court may consider the will, in connection with the petition.' ”

A cursory reading of the two items of the will which we are called upon to construe would present very little difficulty, but, when carefully considered in the light of adjudicated cases, it will be found that few questions have given the courts more trouble.

The bequest and devise in this case is to a class of an aggregate portion of the testator's estate. No intermediate estate is created, and the legacy is not confided to trustees. Certain general principles are deducible from the decided cases.

Where a legacy is given to a class of individuals in general terms, as to the children or grandchildren of a person named, and no period is fixed for the distribution, the time for distribution will be the death of the testator: *Viner v. Francis*, 2 Cox C. C. 190; *Devisme v. Mello*, 1 Bro. C. C. 537; 2 *Jarman on Wills*, 6th ed., *1010, and cases cited.

Under this rule, children born or begotten prior to, and in esse at the time of, the death of the testator will be entitled ⁴³⁴ to share in the distribution, but those living at the execution of the will who die before the testator are excluded.

But, where the distribution is by the terms of the will deferred to some time after the testator's death, the gift will embrace, not only all the children or members of the class living at the death of the testator, but all those who shall subsequently come into existence and are living at the time designated for the distribution.

If the bequest is a present bequest, the beneficiaries who are in esse at the death of the testator will take vested interests in the fund, but subject to open and let in after-born children who shall come into being and belong to the class at the time appointed for the distribution.

And, where the distribution is postponed until the attainment of a given age by the children, the legacy will apply only to those who are living at the death of the testator and who shall come into existence before the first child attains the age named, this being the period when the fund is first distributable with respect to any member of the class.

Where the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interests in their shares subject to the distribution

of those shares as the members of this class are increased by future births, and, on the death of any of the children previous to the period for distribution, their shares will go to their respective representatives: *Tucker v. Bishop*, 16 N. Y. 402.

Recurring to the third item or clause of the will of John Thomas, the language is, "I give to the six children of my son, David Nelson Thomas, and his wife, Elizabeth, one undivided one-third of the residue of my estate. Should any of these children die unmarried and without issue or any other children be born to my said son, I will that all of his children divide equally, share and share alike, the said one-third ⁴³⁵ of my estate." In the preceding clause he had provided that his descendants should be paid their shares upon each arriving at his or her majority.

Under a long line of authorities, it seems settled that the period of distribution fixed by the testator is the majority of the oldest child of David Nelson Thomas.

The gift is a present one, but the time appointed for distribution is the majority of the oldest child. While, therefore, the children living at the time of the death of the testator took vested interests, they were subject to open and let in any and all after-born children to said David N. Thomas who might come into existence and answer the description of being a part of all his children when his eldest child arrived at its majority. As the record discloses that three of the six children of David N. Thomas who were living at the death of the testator reached their majority before the birth of plaintiff, Hezekiah Thomas, he is excluded from sharing in the said legacy to his father's children.

Does this conclusion effectuate the intention of the testator? The general rule for the construction of a will is, that the intention of the testator is to be collected, not from any particular or detached clause of the will, but from the whole taken together, and the general intent is to be preferred to a particular one.

It is contended by plaintiff that the testator, by using the expression, "should any other children be born to my said son I will that all of his children divide equally, share and share alike, the said one-third of my estate," intended that all of the children of David Nelson Thomas, whether born and living at the time he directed the first distribution of this third of his estate or subsequently, should share therein. In other words, the contention is, either that the direction of the testator to distribute to each of his said grandchildren the portion given to him or

her upon his or her reaching his or her ⁴³⁶ majority must be ignored as a minor consideration and the division of this estate be deferred until the possibility of issue becomes extinct in David Nelson Thomas, which is not deemed to be possible so long as he lives: 1 Washburn on Real Property, 5th ed., sec. 36, p. 109; Rozier v. Graham, 146 Mo. 359; or, if the legacies are distributed in accordance with the will, restitution by those who have received their legacies must be made from time to time as other children happen to be born afterward—an extremely inconvenient, if not impracticable, course.

To make each part of the will consistent with the whole the courts have sought to prevent a violation of the intention to give to all of the children by applying the word “all” and “children born” to all of those in esse at the period of distribution. This determination was reached from an anxiety to provide for as many children as possible with convenience: Barrington v. Tristram, 6 Ves. 348. This rule of exclusion of children born after the vesting of any of the shares in possession has been criticised.

Lord Thurlow in *Andrews v. Partington*, 3 Brown Ch. 401, said he often wondered how it came to be so decided, there being no greater inconvenience, in his opinion, in case of a devise than in that of a marriage settlement where nobody doubts that the same expression means all the children. This in turn has been answered with the remark that, in marriage settlements, one, at least, of the parents generally takes a life interest, so that the shares of the children do not vest in possession until the number of objects is fixed, and before marriage, as there are no children to whom it can be applied, it must mean all, and there is no place to draw the line, nor any reason why it should be one more than another. It is a debt of nature, and all the children are entitled, whereas in a legacy like this it depends on the meaning of the words used.

It is well also to state that this rule of exclusion applies ⁴³⁷ only to the distribution of the principal where the aliquot share of each member of a class cannot be ascertained until the class is closed. It has been directly held that it has no reference to legacies of income: *In re Wenmoth's Estate*, 37 Ch. Div. 266.

In *Ellison v. Airey*, 1 Ves. Sr. 111, Lord Hardwicke, the rule was announced that where a legacy is to be distributed among a number described as a class all who answered the description at the time of distribution should take to the exclusion of all who happened to answer it afterward.

In *Heisse v. Markland*, 2 Rawle, 274, 21 Am. Dec. 445, the supreme court of Pennsylvania, in an opinion by Chief Justice Gibson, followed *Ellison v. Airey*, 1 Ves. Sr. 111, and applied it to the construction of a will which gave the legacy to executors in trust to invest and apply to the support and education of all the children of the testator's son Henry, "born and to be born during their respective minorities, as they, the said trustees, shall think proper and most beneficial, and to divide and pay the principal in equal parts and shares to the said children when and as they severally and respectively arrive at the age of twenty-one years." Said Henry had five children living at time of testator's death and five born afterward, and it was admitted he might have more. All the children were living when the suit was commenced, and all except plaintiff were under the age of twenty-one years. It was held none of the children could take who were not born when plaintiff arrived at the age of twenty-one. It was further distinctly ruled that the words "born or to be born" were not sufficient in themselves to change the general rule and let in children born after the first period of distribution.

In *Curtis v. Curtis*, 6 Madd. 17, the residuary bequest was an annuity to the father and remainder subject to the annuity to his children when they attained twenty-one, and it was held that all the children took vested interests when the eldest reached twenty-one years of age: *Ward v. Tomkins*, 30 N. J. Eq. 3.

⁴³⁸ In *Hubbard v. Lloyd*, 6 Cush. 522, 53 Am. Dec. 55, the bequest was "unto all the children of B. equally when they shall severally attain the age of twenty-one years." It was ruled by Chief Justice Shaw that all the children born before one of them reached twenty-one, although born after the death of the testator, would share alike, but those born after the first came of age were excluded. And the same ruling was made by Sir William Grant, as master of the rolls, in *Gilbert v. Boorman*, 11 Ves. 238.

In *Andrews v. Partington*, 3 Brown Ch. 404, Lord Thurlow, the lord chancellor, said: "Where a time of payment was pointed out, as where a legacy is given to all the children of A when they shall attain twenty-one, it was too late to say that the time so pointed out shall not regulate among what children the distribution shall be made. It must be among the children in esse at the time the eldest attains such age."

In the states in this Union, in addition to the cases referred to in *Massachusetts*, *New Jersey*, and *New York*, *Swinton v.*

Legare, 2 McCord Eq. 440, Handberry v. Doolittle, 38 Ill. 202, Simpson v. Spence, 58 N. C. 208, and Shotts v. Poe, 47 Md. 513, 28 Am. Rep. 485, sustain the same doctrine. There are also numerous cases like Storrs v. Benbow, 2 Mylne & K. 46, affirmed in 3 De Gex, M. & G. 390, and Townsend v. Early, 28 Beav. 429, which hold and construe the words found in this will, "any other be born," to mean children born between the making of the will and death of the testator.

The general rule being then so well established, and it being equally well settled that the use of the word "all" or "children born or to be born" do not vary the ordinary rule, we feel constrained to hold that plaintiff cannot take under the will of his grandfather, because he was born after the period fixed by said testator for the distribution of the shares ⁴³⁹ of the children of David N. Thomas, to wit, when the eldest reached the age of twenty-one years.

The cases cited by appellant from our own reports as to the vesting of remainders do not apply here. There is no remainder in the case. No intermediate estate is created by the will.

That plaintiff answers the description of one of the class to whom the gift was devised could not be questioned if he had been born prior to the majority of his eldest brother, but he was not born until after three of said children had reached their majority.

We do not feel at liberty to reject a rule so long asserted and maintained by the highest courts of England and America, nor to discard the reasoning upon which those decisions stand.

The judgment of the circuit court is affirmed.

Sherwood and Burgess, JJ., concur.

Gifts to a Class, such as "Children," and Who are Entitled to Take.*

We shall consider in this note what members of a class are entitled to take when the gift is immediate and when distribution is postponed. In the latter case, special consideration will be given to future gifts as affected by the rule against perpetuities, and an effort will be made to harmonize conflicting decisions and to ascertain what general rules may be evolved from the cases which will guide us in the solution of particular devises which might arise.

Generally speaking, a gift to a number of persons not named, but answering a general description, is a gift to them as a class. What

*REFERENCE TO MONOGRAPHIC NOTES.

Provision in will for after-born child, what is: 15 Am. St. Rep. 592-595.

Devises and bequests to children as a class: 46 Am. Dec. 666, 667; 94 Am. Dec. 156, 157.

persons constitute the class is to be ascertained when the time comes at which the gift takes effect: *Delinger's Estate*, 170 Pa. St. 104. Care must be taken to observe whether a gift is in reality one to a class, or whether it is to specific persons or sets of persons though designated by some general name, as "children." "In legal language, the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons": 1 *Jarman on Wills*, 232.

Survivorship in a class is usually construed with reference to the death of the testator, so as to give the representatives of such of the class as die after the testator the right to a share of the devise or bequest to the class: *Mowatt v. Carow*, 7 Paige, 328, 32 Am. Dec. 641. If the gift is immediate, this is necessarily so. If the gift is contingent, survivorship is reckoned from the happening of the contingency. If the gift is vested, with payment postponed until a future time, survivorship dates from the death of the testator, but members of the class born after the death of the testator and prior to the time of distribution may share.

Where the Gift is Immediate—that is, to take effect in possession immediately on the testator's death—all children living at the testator's death take to the exclusion of those born afterward. This rule is well settled, and arises from the presumption that a will speaks from the death of the testator: *Biggs v. McCarty*, 86 Ind. 352, 44 Am. Rep. 320; *Worcester v. Worcester*, 101 Mass. 128; *Viner v. Francis*, 2 Cox, 190; *Wood v. McGuire*, 15 Ga. 202; *Ingraham v. Ingraham*, 169 Ill. 432, and the principal case. A devise to children generally, not limited to any particular period, includes those children only who are living at the death of the testator, the gift being considered an immediate one: *Thompson v. Garwood*, 3 Whart. 287, 31 Am. Dec. 502; *Loockerman v. McBlair*, 6 Gill, 177, 46 Am. Dec. 664; *Womack v. Smith*, 11 Humph. 478, 54 Am. Dec. 51. Kentucky seems to be an exception among the states in following this rule, the doctrine there being that unless a will shows an intent to exclude after-born children they may participate in the distribution of the testator's estate: *Lynn v. Hall*, 101 Ky. 738, 72 Am. St. Rep. 439. This rule in Kentucky is based upon statute: See *Kentucky Stats.*, sec. 4848.

The will may speak from the date of its execution, however, if there is a clear intent that it shall so do, in which case the members of a class who take will be ascertained as of the date of the making of the will: *Morse v. Mason*, 11 Allen, 36. The general rule holds good though there may be a gift over in default of children or in case children die under age, and this does not have the effect of enlarging the class: *Davidson v. Dallas*, 14 Ves. 576; *Chasmar v. Bucken*, 37 N. J. Eq. 415.

Where the gift is immediate, and there are no children in being at the time of the testator's death belonging to the particular class of beneficiaries, the gift does not lapse, but all children answering the description born at any time afterward are entitled to take: *Weld v. Bradbury*, 2 Vern. 705; *Shepherd v. Ingram*, 1 Amb. 448. Where a gift is made of the income of property, only those members of a class take who were in existence at the death of the testator: *In re Powell*, [1898] 1 Ch. 227.

In general, the same rule of construction applies to deeds as to wills, with the exception that a more liberal construction is given to wills in favor of persons not born. Hence, a deed to the heirs of B. contemplates the children of B. in existence at the date of the execution and delivery of the deed, and children of B. subsequently born take no interest thereunder: *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439.

Immediate Gift—Children “en Ventre.”—Under a devise to all the children of A, a posthumous child is entitled to take. This was definitely settled by the case of *Doe v. Clarke*, 2 H. Black. 399, where, under a gift to A and to all his children living at his death, a child born seven months after his death was allowed to take: See, also, *Clarke v. Blake*, 2 Ves. 673. The rule is now uniform both in England and America. A child is to be considered in being at a period commencing nine months previous to its birth, and, where there is no evidence to rebut the presumption, it is conclusive. “Generally, a child will be considered in being from conception to the time of its birth in all cases where it will be for the benefit of such child to be so considered.” Hence a child *en ventre sa mere* will be considered as absolutely born in order that it may participate in a present gift to children who are born: *Hall v. Hancock*, 15 Pick. 255, 26 Am. Dec. 598; *Stedfast v. Nicoll*, 3 Johns. Cas. 18; *Barker v. Pearce*, 30 Pa. St. 173, 72 Am. Dec. 691; *Laird’s Appeal*, 85 Pa. St. 339. But while an unborn child may inherit for its own benefit, yet it cannot inherit so as to transmit property to others unless it is actually born alive. “Children in the mother’s womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early state of pregnancy as to be incapable of living, although they be not actually dead at the time of their birth, are considered as if they had never been born or conceived”: *Marsellis v. Thalhimer*, 2 Paige, 35, 21 Am. Dec. 66.

A will must be construed according to the intention of the testator, and if it shows a clear intent to exclude children *en ventre sa mere*, such children must be denied a right to share in the distribution of the estate: *In re Emery’s Estate*, 3 Ch. Div. 300; *Starling v. Price*, 16 Ohio St. 29.

Illegitimate Children.—Generally speaking, a gift to children includes only those who are legitimate, upon the legal principle that illegitimate children have no parent and cannot be designated by a relation they do not sustain. This general rule, however, yields to

that fundamental rule in the interpretation of wills, viz., that every will should be interpreted in accordance with the intention of the testator. Hence, if that intent clearly indicates that illegitimate children should share in his estate, courts will decree accordingly. This was so held in *Sullivan v. Parker*, 113 N. C. 301, where the testatrix devised property to "all the children of her [daughter's] body," and the testatrix, at the time of the making of the will, was living with her daughter and her supposed husband, by whom she had had four illegitimate children. The same rule was applied in *In re Harrison*, [1894] 1 Ch. 561, the children of testator's daughter being allowed to share in the estate, although illegitimate, when the daughter was described as the wife of one H., with whom she was living to the knowledge of the testator, and by whom she had had the children in question.

Where children are legitimized by a subsequent marriage of their parents, they will be allowed to take, under a statute giving them such a right: *Smith v. Lansing*, 24 Misc. Rep. 566; 53 N. Y. Supp. 633. In England, while children who have been made legitimate by a subsequent marriage of their parents may take real property under a will devising property to "children," they cannot take if the deceased dies intestate: *In re Grey's Trusts*, [1892] 3 Ch. 88. An illegitimate child *en ventre sa mere* at the date of the testator's death is not deemed to be in being so as to take a gift which vests at the death of the testator, although legitimized by the marriage of its parents before it was born: *In re Corlass*, 1 Ch. Div. 460. In such a case, the estate vested in the children before the marriage, and as the illegitimate child could not take until legitimized, and as at the time it was legitimized, viz., the date of the marriage, the estate had already vested, it was of necessity cut out the same as an after-born child would have been: *Smith v. Lansing*, 24 Misc. Rep. 566; 53 N. Y. Supp. 633.

Where Distribution is Postponed until the Termination of a Precedent Interest.—Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the persons living at the death of the testator, but all who may subsequently come into existence before the period of distribution. This rule is also firmly established and universally recognized. It is only in the application of the rule that any difficulty arises: *Ayton v. Ayton*, 1 Cox, 327; *Moore v. Dimond*, 5 R. I. 121; *Jones' Appeal*, 48 Conn. 60; *Webster v. Welton*, 53 Conn. 183; *Handberry v. Doolittle*, 38 Ill. 202; *Ridgeway v. Underwood*, 67 Ill. 419; *Teed v. Morton*, 60 N. Y. 502; *Thompson v. Garwood*, 3 Whart. 287, 31 Am. Dec. 502.

A testator may, however, intend to confine his gift to those living at his death, though its possession is postponed, and in such a case the testator's intent will control. The law favors the vesting of estates, and, if consistent with the testator's expressed intent, a will should be so construed as to vest the property at the time of the

testator's death. Hence, where a testator devised his property to his widow for life, and at her death to be divided among "my surviving children and their heirs," these last words were deemed to give a vested interest to the children who were in existence at the testator's death: *Grimmer v. Friederich*, 164 Ill. 245. Again, in a will in which a devise to a class was expressly limited to those of such class "then living," it was held that this limitation would apply to all other classes mentioned in the will, though not specifically so applied by the will itself: *Dougherty v. Thompson*, 27 Misc. Rep. 738; 59 N. Y. Supp. 608. The mere charging an estate with certain terms such as the paying of certain annuities will not have the effect of letting in after-born children to share in the original gift: *Singleton v. Gilbert*, 1 Cox, 68. In Pennsylvania, it is held that a provision in a will giving the share of a deceased member of a class to his children would have the effect of taking the case out of the rule that a gift to a class goes to the persons constituting the class at the time the gift takes effect, upon the principle that if the testator by his will shows how he intended a particular class should be made up, the general rules governing a gift to a class must yield to the testator's expressed intention: *In re Denlinger's Estate*, 170 Pa. St. 104.

A large number of the cases involving a gift over after a precedent estate or interest comprise devises to one for life with a remainder over to a certain class of children. Where the remainder is to the children of the life tenant, or to the children of anyone aside from the testator, the gift will include all children who answer the description at the time of the death of the life tenant, when the precedent estate terminates, whether such children were born before or after the death of the testator: *Thompson v. Garwood*, 3 Whart. 287, 31 Am. Dec. 502; *Coggins v. Flythe*, 113 N. C. 102; *McLain v. Howald* (Mich.), 79 N. W. Rep. 182. The rule that such a gift to a class will include all members of that class who may be born before the particular estate falls in will apply to gifts disposing of remainders previously created, as well as to gifts creating remainders. For example, where A devises a life estate to B, remainder to C, and C dies leaving a will disposing of his remainder to the children of D, all the children of D who may be born before the termination of B's life estate are entitled to share in the remainder, and the gift is not limited to the children of D living at C's death: *Britton v. Miller*, 63 N. C. 268.

The question arises in a gift of a life estate with a remainder over whether the remaindermen take vested or contingent interests. In either event, if the distribution is postponed, all who come within the description at the time the gift is to be distributed will be included as within the intention of the testator, for the question as to who will eventually take must not be confounded with the question when the estate given vests in the donees. The vesting in enjoyment and the vesting in interest are very different propositions: See *McLain*

v. Howald (Mich.), 79 N. W. Rep. 182; Hall v. Hall, 123 Mass. 124; Doe v. Considine, 6 Wall. 458. It is the policy of the law that estates should vest at the earliest possible moment, and no remainder will be construed contingent which may, consistently with the intention, be deemed vested: Hovey v. Nellis, 98 Mich. 374. It must be admitted that the cases are somewhat confusing on this point, failing to discriminate between a devise which vests immediately, the enjoyment of which only is postponed, and a devise which is contingent, because both the vesting in interest and enjoyment are postponed. In both cases all who answer the description of the class to whom the devise is made at the time the gift vests in enjoyment are entitled to take. But in the first case the period of survivorship is ascertained at the death of the testator, the class opening to let in all who are born subsequently and prior to the time of distribution. In the second case, the period of survivorship is ascertained at the time the gift is to be distributed, and all those who die before that time are completely cut out, since their interest is contingent on surviving until the period of distribution. The necessity of keeping this distinction in mind will be apparent later.

Where the devise is of a life estate with a remainder over to the children of the life tenant, or to the children of anyone else, and the gift is to children generally, then the estate in remainder vests at the death of the testator in the children then in being, subject to open and let in those afterward born before the period of distribution: Dingley v. Dingley, 5 Mass. 535; McComb v. McComb, 96 Va. 779; Hamletts v. Hamlett, 12 Leigh, 350; Denny v. Allen, 1 Pick. 147; Annable v. Patch, 3 Pick. 360; Campbell v. Stokes, 142 N. Y. 23. This rule was held to apply only to real property in Dingley v. Dingley, 5 Mass. 535, since there can be no remainder in personal property which may vest and afterward open to let in after-born children; hence the interest in personal property must be contingent, until the time provided for the distribution of it, in order that they may take. This limitation of the rule to real property was denied in Yeaton v. Roberts, 28 N. H. 459. It is not now the rule in Massachusetts: Shattuck v. Stedman, 2 Pick. 468; and there would appear to be no reason for distinguishing the two classes of property. The use of the word "children" in a general devise makes the persons to take as certain as they would have been had the names of the remaindermen been given: Mercantile Bank v. Ballard, 83 Ky. 481, 4 Am. St. Rep. 160. A remainder is not made contingent by the fact that the interest of the remainderman may be divested by his death before the death of the life tenant: Ducker v. Burnham, 146 Ill. 9, 87 Am. St. Rep. 135. See, also, Canfield v. Fallon, 26 Misc. Rep. 345; 57 N. Y. Supp. 149. In the case we have just been considering, where the interest of the remaindermen vests at the death of the testator, survivorship is determined as of that date, and hence, if any member of the class dies before the life tenant, his share devolves upon his appropriate representatives, and it is not essential that he should survive until the period of distribution: Hatfield v.

Sohler, 114 Mass. 48. The interest of a member of a class which becomes vested on the death of the testator is not divested by the death of such member before the death of the life tenant, but such share goes to his heirs or representatives: *Palen v. Youmans*, 20 N. Y. Supp. 657. A vested remainder may be absolutely or defeasibly vested. In the case we are considering it is of the latter character, and is divested pro tanto upon the birth of other children, and, where there is a substituted devise, it may be wholly divested on the death of the party in favor of the substituted devisee. But, in the absence of any substituted devise, a member's share will, upon his death, descend to his heirs or representatives: *L'Etourneau v. Henquenet*, 89 Mich. 428, 28 Am. St. Rep. 310; *Budd v. Haines*, 52 N. J. Eq. 488. The remainder vested in the children is not such a vested estate as can be sold for the payment of the debts of one child dying before the time for distribution has arrived: *Corey v. Springer*, 138 Ind. 506.

It may appear from the context of the will that the testator did not intend that the remainders should be vested, but that they should be contingent on the happening of some event. Hence, where a testator gave a share of the income of his estate to his wife, and gave the residue of the estate to his children, the executor to hold until the youngest became of age, at which time the executor should divide the estate remaining equally between "the children then living," the court held that the children took contingent remainders; that until the youngest became of age it could not be determined who were the then living children, and therefore the testator could not have intended to give vested remainders: *Wilhelm v. Calder*, 102 Iowa, 342. A devise of a life estate to a son, with remainder over to the son's "living children," includes the son's children living at the termination of the life estate: *Inge v. Jones*, 109 Ala. 175. In a devise to the testator's wife for life, and at her death to such of his children as shall then be living, the benefit does not purport to be conferred on the children as individuals named, but as survivors, and this indicates that an immediate vesting is not intended. The gift is, therefore, contingent: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135. A limitation to "my surviving legatees," after the termination of a conditional fee, means the legatees who are surviving at the period of distribution, and not those who survive the testator: *Selman v. Robertson*, 46 S. C. 262. This has not always been the rule, however. Indeed, the early English cases quite generally held that "surviving children" and similar terms referred to the death of the testator as the period of survivorship, and not to the time of distribution: See *Stringer v. Phillips*, 1 Eq. Cas. Abr. 293; *Rose d. Vere v. Hill*, 3 Burr. 1881; *Roebuck v. Dean*, 2 Ves. 265. The English rule is now definitely settled, and a gift to "surviving children" refers to the period of distribution as the time for determining the class: *Cripps v. Wolcott*, 4 Madd. 11; *Neathway v. Reed*, 3 De Gex, M. & G. 18. See, also, *Coveny v. McLaughlin*, 148 Mass. 576; *Teed v. Morton*, 60 N. Y. 502; *Delaney v. McCormack*, 88 N. Y. 174. And while, generally,

the use of the words "surviving children," as applied to a gift which is to take effect after the termination of a precedent estate, refers to children who are surviving at the time of distribution, their interest being contingent until that time. But if coupled with the words "surviving children" are the words "and their heirs," these last words indicate that the testator had in mind that in case any of his children should die after his death, before coming into the enjoyment of the estate, the heirs of such child should not be cut off, and the children take vested interests at the date of the testator's death: *Grimmer v. Friederich*, 164 Ill. 245. As already stated, the principles applicable to the vesting of devises of real estate apply, generally, to gifts of personalty. Where, however, there is no original gift of personal property, but only a direction to pay at a future time, the vesting in interest and enjoyment is postponed until the time of payment: *Carper v. Crowl*, 149 Ill. 465; *Delaney v. McCormack*, 88 N. Y. 174. The rule to determine whether a gift to come into enjoyment in the future is a present vested gift or a contingent one is this, as laid down by the Illinois supreme court: If the time of distribution be annexed to the substance of the gift and be personal to the legatee or devisee, the gift is contingent; if the time of payment merely is postponed, because of the position of the fund or the convenience of the estate, the gift is vested and its enjoyment only is deferred: *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135; *Carper v. Crowl*, 149 Ill. 465. See, also, *Delaney v. McCormack*, 88 N. Y. 183. This rule may oftentimes be difficult of application, but if properly applied will reconcile most of the cases relating to gifts to a class where the period of distribution is postponed.

The Precedent Estate may be One in Trust instead of for life, and the same results follow as in a life estate. Where property is given in trust to pay the proceeds to some one during his life and at his death to certain children as a class, all children living at the time of the termination of the life interest take, whether in being at the death of the testator or not: *Evans' Estate*, 155 Pa. St. 646; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693. It is immaterial whether the precedent estate is one for life, a conditional fee, or in trust—the same rules in general apply: *Selman v. Robertson*, 46 S. C. 262; *Mercantile Bank v. Ballard*, 83 Ky. 481, 4 Am. St. Rep. 160. Where property is devised in trust for the accomplishment of certain purposes, and, when accomplished, the property to be divided between the members of a class, the members of that class in being at the death of the testator take vested interests in the estate, the enjoyment only being postponed: *Marsh v. Hoyt*, 161 Mass. 459. In such a case, the time of payment merely is postponed for the convenience of the estate: *Adams v. Woolman*, 50 N. J. Eq. 516. The children in being at the death of the testator take vested interests, subject to open and let in after-born children: *Levy v. Levy*, 79 Hun. 290; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693; *Campbell v. Stokes*, 142 N. Y. 23; *Evans' Estate*, 155 Pa. St. 646; *Man's Estate*, 160 Pa. St. 609. The interest to fol-

low the trust estate may be contingent and not vested, the same as where a life estate intervenes: *McBride v. Smyth*, 54 Pa. St. 245. "The testator has the right to fix the period of vesting to suit his wishes. He can postpone the period and make the vesting depend upon a contingency, and if he does, with reasonable certainty, the estate will not vest until the happening of this contingency. And whether the testator intended to give a vested estate or to make it depend upon a future contingency depends in a great measure upon the language and phraseology of the will itself": *Cherbonnier v. Goodwin*, 79 Md. 55. In this case property was given in trust to be invested and the income to be used in the maintenance and support of the son of the testatrix, and after his death the trust estate to be divided equally among the children which the son might have after the execution of the will. The son had two children born after the execution of the will, one of whom died in the lifetime of its father. The court held that the interest bequeathed was contingent, that the legacy could not vest until the son's death, and since at that time there was but one child living, the entire estate vested in him both in interest and possession. In this case it will be noticed that there was no gift aside from the direction to pay at a future time. In all such cases the gift is contingent on the happening of the event, and only those members of a class who answer the description at that time can take.

Statutes have been passed in several states similar to section 863 of the California Civil Code. These acts declare that trusts in real property vest the whole estate in the trustees, the beneficiaries taking no interest or estate in the property, but merely a right to enforce the trust. These acts probably do not change in any way the rights of beneficiaries under a will. Even though they take no estate so-called, yet their interests are as substantial as if they did, and their interests will be vested or contingent in the same manner as if such interests were estates, and will be subject to the same rules, so far as their vested or contingent nature is concerned.

Where Distribution is Postponed until a Given Age.—Where there is a gift to children as a class, and the share of each child is made payable on the attainment of a given age, the period of distribution is the time when the first child becomes entitled to receive his share. The gift will apply to those who are living at the death of the testator, and to those born before the first child attains the requisite age, and all children coming into existence after that period are excluded: *Whitbread v. Lord* St. John, 10 Ves. 152; *Clarke v. Clarke*, 8 Sim. 59; *Dawson v. Oliver-Massey*, 2 Ch. Div. 753; *Hubbard v. Lloyd*, 6 Cush. 522, 53 Am. Dec. 55; *Handberry v. Doolittle*, 38 Ill. 202; *Andrews v. Partington*, 3 Brown Ch. 401. This rule fixing the period of distribution at the time the first child becomes entitled to his share is generally denominated a rule of convenience, and springs from the desire of courts to include as many persons as possible within the testator's bounty consistent with convenience: See Bar-

rington v. Tristram, 6 Ves. 348. This rule does not apply to a gift of income which is payable periodically: *In re Wenmoth's Estate*, 37 Ch. Div. 266. This rule is frequently obliged to be construed in conjunction with a previous rule noticed, viz., that a gift following an estate for life is to be distributed upon the termination of the precedent estate. In such a case, the period of distribution is ascertained by the event which happens last. For example: A devise to A for life and then to the children of A, who attain twenty-one; if A dies before any of his children become twenty-one, distribution will take place when the eldest attains that age; and, if the eldest becomes of age before the death of A, A's death will mark the period of distribution. In any event, no child born after the time of distribution has been reached will be allowed to participate in the gift: *Clarke v. Clarke*, 8 Sim. 59; *Beckton v. Barton*, 27 Beav. 99; *Parsons v. Justice*, 34 Beav. 598.

Where distribution is directed to be made generally when children reach twenty-one, the testator's intent is clear; it is certain that as soon as any child attains twenty-one he is to have his share, and the division must take place at that time to the exclusion of after-born children. But a devise may be made to the children of A, to be paid when the youngest reaches a certain age. It is clearly the testator's intention to provide for any and all of A's children. Such a gift should, therefore, include all the children which A may have, whether born before or after the death of the testator. The youngest child means the youngest whenever born, and not the youngest living at the death of the testator, and it is accordingly held that the period of distribution is the time when the youngest, whenever born, attains the specified age: See *Fosdick v. Fosdick*, 6 Allen, 41; *Hughes v. Hughes*, 3 Brown Ch. 352, 434; *Lasby v. Crewson*, 21 Ont. 93. Where the words of distribution were "and when and so soon as all and every his said grandchildren should have attained twenty-one," a distribution was denied merely because the youngest for the time being had become of age, since the gift was intended to include all grandchildren, whenever born: *Mainwaring v. Beever*, 8 Hare, 44.

It would seem that where a testator manifests an obvious intention to provide for all of his grandchildren, and designates the period of distribution as when the youngest arrives at a certain age, the only logical conclusion is that the youngest means the youngest whenever born, and until the possibility of having grandchildren becomes extinct it is impossible to determine who the youngest may be. Hence, if the period for determining that event is too remote, the gift to grandchildren is void for remoteness. In most of the cases involving this point it will be found that there are expressions in the will of the testator which rendered his intent more or less ambiguous, and there was in consequence an opportunity for construction of the will. And in case of ambiguity a will may always be construed so as to render it valid. As is stated elsewhere, the rule against perpetuities is not a rule of construction to determine intent. It is a

rule which defeats intent. And only when the will is ambiguous can the principle be applied that, of two constructions, the one which renders a will valid will be adopted in preference to one which renders it invalid. In the case of *McBride's Estate*, 152 Pa. St. 192, the testator used ambiguous language which rendered it uncertain what his intent was. This ambiguity furnished the pretext for construction, and that construction was adopted which upheld the validity of the will. The same is true of *Butler v. Butler*, 3 Barb. Ch. 310, though here the word "eldest," and not "youngest," was used. In *Wheeler v. Fellowes*, 52 Conn. 238, the desire of the testator to provide for all his grandchildren was unquestioned. And yet the court erroneously applied the rule against perpetuities as one of construction, and said: "We think it must be the youngest living at the death of the testator. The other view would render this part of the codicil obnoxious to the statute against perpetuities." A similar error was committed in *Cogan v. McCabe*, 23 Misc. Rep. 739, 52 N. Y. Supp. 48, which is a remarkable case, in that it construes the testator's will, apparently, directly contrary to his expressed and obvious intention. Hard cases are likely to play havoc with legal principles, and a court will often strain many points in order to avoid a hardship. Notwithstanding these cases, it is submitted that where the intent of the testator is to include all children or grandchildren of a class, whenever born, the use of the term "youngest" refers to the youngest of such children whenever born, otherwise the testator's bounty may be limited to an extent never contemplated by him, and a new will is in reality made, to which it is altogether doubtful whether he would have subscribed.

It is important to ascertain whether a gift to be distributed upon children becoming a certain age is vested or contingent. Where there is an actual present gift, and the period of distribution merely is postponed, the children take a vested estate, though it may open to let in after-born children: *Emerson v. Cutler*, 14 Pick. 108.

And where property is devised in trust to hold for certain children, the children take vested interests, though the possession of the property is postponed until arrival at a definite age: *Winslow v. Goodwin*, 7 Met. 363. The law here, as elsewhere, favors the vesting of estates, and where there is no special intent manifest to the contrary, survivorship in a gift to a class is referred to the time of the testator's death, though distribution is postponed to a given age, and though members of the class born after the death of the testator and prior to the period of distribution, are entitled to share in the estate devised: *Hempstead v. Dickson*, 20 Ill. 194, 71 Am. Dec. 260. An intent to postpone the vesting of an estate must be clear and manifest in order to overthrow the established rule that estates vest at the earliest possible moment, which is ordinarily at the death of the testator. It was said in *Kelly v. Gouce*, 49 Ill. App. 82, that "a distinction must be drawn between a gift to such children as shall arrive at legal age, and a gift to children to be paid when or as they arrive at legal age. In the first instance, the gift

is contingent, because it cannot be known at the death of the testator whether a donee will be found at the proper period of time to take, while in the latter instance the donee is known at the time of testator's death, the gift settled upon him, and its payment only deferred. When the donee is known, the gift is said to vest in interest at once, and, though such donee does not survive to take possession of the subject matter of the gift, his interest and right of possession pass, upon his death, to his legal representatives. When no gift is found beyond a mere direction to distribute or divide at a certain stated period, or upon the happening of some event, the rule is different": See *Parker v. Leach*, 66 N. H. 416; *Canfield v. Fallon*, 26 Misc. Rep. 345, 57 N. Y. Supp. 149, where a large number of the New York cases are collected. Where there is any serious doubt whether a legacy is vested or contingent, the doubt should be resolved in favor of vesting, if such conclusion can be reached by a fair and reasonable construction of the whole will. But a clear intent to the contrary cannot be avoided. The tendency to favor the vesting of estates has been so strong that the Pennsylvania courts held that a direction in a will that an estate should be divided "among his children which should be then alive" gave a vested interest to the children: *Manderson v. Lukens*, 23 Pa. St. 31, 62 Am. Dec. 312. This was clearly a direct alteration of the testator's intention, which would not be permitted to-day, and the case itself is, in effect, overruled by *Rudy's Estate*, 185 Pa. St. 359, 64 Am. St. Rep. 654. See, also, *Cascaden's Estate*, 153 Pa. St. 172.

The rule for ascertaining when a gift, the possession of which is postponed, is vested or contingent was stated in *Coggins' Appeal*, 124 Pa. St. 10, 10 Am. St. Rep. 565, as follows: "Where real or personal estate is devised or bequeathed to such children as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is contingent on account of the person. For until the age is attained, the character is sustained, or the act is performed, the person is unascertained; there is no person answering the description of the person who is to take as devisee or legatee." This rule, as taken from *Smith on Executory Interests*, is clear cut and well defined, though its application to ambiguous wills may oftentimes be difficult. Where there is no gift aside from the direction to divide at a future time, only those take who answer the description at that time, the gift is contingent, and the period of vesting and of distribution are one and the same: *Locke v. Lamb*, L. R. 4 Eq. 372; *Clarke v. Clarke*, 8 Sim. 59.

This rule relating to a direction to divide has these qualifications, that where the terms of a bequest import a gift, and also a direction to pay at a subsequent time, the legacy vests immediately at the death of the testator: *Manice v. Manice*, 43 N. Y. 369. Again, where interest is given to the legatee with a direction for the pay-

ment of the principal at a future time, the payment of interest indicates an intent on the part of the testator to give the principal to the legatee, and his interest will vest at the testator's death: *Warner v. Durant*, 76 N. Y. 136. The entire interest must be payable to the legatee in order to establish an intention that the principal should vest in him at once. Also if the legacy is given over in the event of the death of the legatee, there can be no presumption that a present gift was intended: *Smith v. Edwards*, 88 N. Y. 92.

There is one class of cases in which it is wholly immaterial what language the testator has used relative to a gift payable in the future—the vested or contingent nature of the bequest is unimportant. This class relates to bequests of specific sums of money to each individual of a class. In such a case, only those answering the description of the class at the time of the death of the testator can take. And this is true whether the distribution is to take place at a future time or not, and whether the beneficiaries are given a vested or a contingent interest. For example, a bequest of fifty dollars each to the children of A, to be paid when the youngest attains the age of twenty-one, includes only those children of A who are living at the date of the testator's death. If all the children of A were to be admitted, whenever born, the aggregate gift might be very largely increased, and the entire residuary estate must needs be kept intact to provide for future unborn children until the possibility of increase is extinct. The extreme inconvenience of postponing distribution under such circumstances is obvious, and to avoid such inconvenience the rule stated above is adopted. Where the gift is aggregate to the entire class, an undue inconvenience does not result, and the rule is otherwise. As was said in the leading case on this point (*Ringrose v. Bramham*, 2 Cox, 384), in speaking of the difference between an aggregate sum to a class and a specific sum to each individual of a class, where a gross sum of three hundred and fifty pounds sterling was given to children, to be paid to them in equal shares at twenty-one, "there was no inconvenience in postponing the vesting of those shares until some one of them attained that age, so as to let in the children born in the meantime, because there was nothing to do but to set apart the sum of three hundred and fifty pounds sterling, and the residue of the testator's personal estate might be immediately divided; for whether more or fewer children divided the three hundred and fifty pounds sterling, still they could have but three hundred and fifty pounds sterling amongst them. But here there are distinct legacies of fifty pounds sterling to each of the children, and therefore, if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of [the parents] for I can never divide the residue until I know how many legacies of fifty pounds sterling are payable": See, also, *Mann v. Thompson*, Kay, 638; *Storrs v. Benbow*, 2 Mylne & K. 46. And it follows as a corollary from this proposition that if there

are no children belonging to the class at the death of the testator, the legacies fail altogether: *Rogers v. Mutch*, 10 Ch. Div. 25.

Application of the Rule against Perpetuities.—Most difficult questions arise when a gift to a class, otherwise valid, is rendered invalid by reason of the too remote vesting of the interests. The courts have striven to uphold gifts by testators almost to the limit of nullifying the rule against perpetuities, and have even sought to make of that rule, what it was never designed to be, a rule of construction. As was stated by Gray, in his work on the Rule against Perpetuities, section 629: "The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore, every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied": See *Dungannon v. Smith*, 12 Clark & F. 546. If the rule has any legitimate place in the construction of devises, it is only where the intent of the testator has been expressed in language so ambiguous that it is fairly and reasonably capable of two constructions and his real meaning is obscured, then that construction will be adopted which avoids the rule and renders the gift valid. As was said in *McBride's Estate*, 152 Pa. St. 192: "The presumption is that the testator knew and endeavored to comply with the law applicable to the trust he created, and, if his will fairly admits of a construction which sustains the trust and gives the proceeds of it to his intended beneficiaries, it should be adopted." In *In re Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308, it was said that when language is fairly capable of two constructions, one of which will produce a lawful result, and the other one that is bad for remoteness, the former should be adopted rather than the latter. But language otherwise clear is not to be rendered ambiguous and capable of two constructions merely by the fact that its obvious meaning violates the rule against perpetuities.

The rule was well stated by Lord Selborne in *Pearks v. Moseley*, 5 App. Cas. 714: "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight, even in questions of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law."

Again, it must be borne in mind that the rule against perpetuities is concerned only with the commencing of the estate, and, if it com-

mences or vests in interest within the prescribed period, it is good, but if it is contingent and will not vest until a time later than that allowed by the statute the estate is void in its creation: *Johnston's Estate*, 185 Pa. St. 179, 64 Am. St. Rep. 621.

The general rule may be stated that a gift to a class upon a contingency which may happen beyond the limits of the rule against perpetuities is bad. The important point to determine first in ascertaining whether a future gift violates the rule is whether the gift vests in interest upon the death of the testator, or at least within the limits of the rule, or whether it does not vest in interest until the final period of distribution, which may be beyond the period allowed by the rule for the vesting of estates. In the latter case, that is, where the gift is purely contingent, there can be no question whatever—the rule is violated, and the gift is void. And the possibility of the gift being void as to one member of the class renders it void as to all. The ordinary example of such a case is where a devise is made to such children as reach the age of twenty-five. Here the attainment of the age forms a part of the description of the devisee—the vesting is suspended until the requisite age is reached. And, since the age limit is a period of time greater than that allowed by the statute, the gift is void. The leading case on this entire subject is *Leake v. Robinson*, 2 Meriv. 364. This was a gift to trustees to pay the income to A during his life, and after his death to pay the income to A's children, and to divide the corpus of the property among such of A's children as shall attain the age of twenty-five, and, if all but one child should die before their shares became payable, then the whole to the surviving child. It is plain from this language that the grandchildren were given contingent interests, no share vesting until the child entitled to it should become twenty-five. The court, among other things, said: "There is no direct gift to any of these classes of persons. It is only through the medium of directions given to the trustees that we can ascertain the benefits intended for them. . . . I think none were to take vested interests before the specified period. The attainment of twenty-five is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed, for there is no antecedent gift, as there was in the case of *May v. Wood*, of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five. . . . After-born children were to be let in, and the vesting was not to take place till twenty-five. The consequence is, that it might not take place till more than twenty-one years after a life or lives in being at the death of the testator. It was not at all disputed that the bequests must for that reason be wholly void, unless the court can distinguish between the children born before, and those born after, the testator's death. Upon what ground can that distinction rest? Not upon the intention of the testator; for we have already ascertained that all are included in the description he has given of the objects of his bounty. And all who are included in it were equally capable of tak-

ing. It is the period of vesting, and not the description of the legatees, that produces the incapacity. . . . The bequests in question are not made to individuals, but to classes, and what I have to determine is, whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests what he never intended them to be." This case settled permanently the question as applied to contingent interests, that is, where the vesting in interest was contingent: See, also, *Eldred v. Meek* (Ill.), 55 N. E. Rep. 536; *Coggins' Appeal*, 124 Pa. St. 10, 10 Am. St. Rep. 565; *Schwencke v. Haffner*, 22 Misc. Rep. 293; 50 N. Y. Supp. 165; *Johnston's Estate*, 185 Pa. St. 179, 64 Am. St. Rep. 621; *Smith v. Edwards*, 88 N. Y. 92; *Schettler v. Smith*, 41 N. Y. 334. The vesting may be suspended until the arrival of children at a certain age, though the issue take in case of death upon their attaining the same age, and the limitation over is only to take effect in case of death under that age without issue: *Coggins' Appeal*, 124 Pa. St. 10, 10 Am. St. Rep. 565. A gift to the "body heirs" of three certain children, share and share alike, is a gift to a class that cannot be determined until the death of all three children. "Until all these contingencies happen, there is no person or persons in whom the estate can vest in fee simple absolute." The gift is void as suspending the power of alienation for three lives in being instead of two: *Trufant v. Nunneley*, 106 Mich. 554. A large number of the cases belong to this class, viz., where the interest does not vest until a future contingency occurs, which may be at a period too remote to satisfy the rule against perpetuities. In *Bull v. Pritchard*, 1 Russ. 213, property was bequeathed to trustees to pay the income to his daughter for life, and after her death to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike. In declaring the entire gift void, the court said: "It is clear that those children alone of the daughter were to take who attained the age of twenty-three years. The attainment of that age was necessary to vest an interest in any of them; and all who attained that age were to take. Consequently, the vesting of the interests might not take place till more than twenty-one years after a life in being. The court cannot distinguish between the children born in the lifetime of the testator and those who were or might be born afterward; and therefore the limitations over are too remote": See *Stuart v. Cockerell*, 7 Eq. 363; *Bull v. Pritchard*, 5 Hare, 567; *Seaman v. Wood*, 22 Beav. 591; *Webster v. Boddington*, 26 Beav. 128; *Newman v. Newman*, 10 Sim. 51; *Blight v. Hartnoll*, 19 Ch. Div. 294; *Dodd v. Wake*, 8 Sim. 615; *Merlin v. Belgrave*, 25 Beav. 125; *Rowland v. Towney*, 26 Beav. 67.

Under a bequest in trust to accumulate until grandchildren as a class respectively attain the age of thirty-five years, when the property is to be divided, the grandchildren take contingent inter-

ests, which do not vest until they respectively arrive at the age of thirty-five years; consequently, the gift is void for remoteness: *Hall v. Hall*, 123 Mass. 120. A devise in trust for all the children of A, to be divided equally between them, the shares of such children to become vested interests in and to be paid, assigned, and transferred to them respectively, as and when they should attain their respective ages of twenty-five years, was held to give a contingent interest, and, as it might not vest until after lives in being and twenty-one years, it was void: *Comport v. Austen*, 12 Sim. 218.

The cases seem to be harmonious on this particular question that where the interest is not to vest in the members of a class until at a period which may offend the rule against perpetuities, the gift is void as to the entire class. Children in being at the death of the testator whose share might vest within the prescribed period cannot be segregated from the rest of the class and be allowed to take. The gift, being void as to one, is of necessity void as to all: See *Blagrove v. Hancock*, 16 Sim. 371. In *Fosdick v. Fosdick*, 6 Allen, 41, it was said: "This rule is imperative and perfectly well established. An executory devise either of real or personal estate is good, if limited to vest within the compass of a life or lives in being, and twenty-one years afterward. But the limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If, by any possibility, the vesting may be postponed beyond this period, the limitation over will be void." In this case the testatrix bequeathed her estate to trustees to keep invested and to accumulate until her youngest grandchild should, if living, attain the age of twenty-one years, and then pay over annually the income to them with provisions for the future disposition of the corpus of the estate. It was held that no portion of the gift might vest until twenty-two years beyond lives in being, and hence was void.

Attempts have been made to obviate the effect of this rule and to allow those members of a class who were in being at the testator's death to share in the gift. Indeed, the statement has been made broadly that where, by reason of letting in members of a class coming into existence after the testator's death, the limits of perpetuity may be exceeded, a more restricted rule may be applied. This restriction is wholly untrue as applied to gifts which do not vest in interest until a future period. No doubt can possibly exist in such a case. No member of the class living at the testator's death can possibly take unless he fulfills the description at the time of the vesting in interest, and you must await such time to determine whether he fulfills the description. Suppose a testator devised property to such of his grandchildren as were practicing law twenty-five years hence. At his death five grandchildren were living, none of whom answered the description. It is certain that the testator did not intend that the five members of the class living at his death should take, irrespective of their calling. He meant to include only those who answered the particular description, that is, practicing

lawyers twenty-five years after his death. Until that time it cannot be known who are members of the class. An interest in the gift cannot vest until that time. And as the period is too remote to satisfy the rule, the gift is void as to all the class. A more restricted rule cannot be adopted and the devise given to the grandchildren living at his death. The same is true where the gift is to such grandchildren as attain the age of twenty-five. The gift is not to vest until that time, and, that time being greater than the rule allows, the gift is void: See *Lawrence v. Smith*, 163 Ill. 149.

Any apparent exception to this rule will be found on examination to be a case of vesting in interest immediately on the testator's death: See *Kevern v. Williams*, 5 Sim. 171, which is often cited as sustaining this rule. Here, however, the vesting in interest was immediate. *Elliott v. Elliott*, 12 Sim. 276, is wrongly decided unless the interest given was a vested one.

The rule for determining whether a devise is vested or contingent has already been stated.

One exception must be noted to the rule that contingent interests which may not vest within the time allowed by the statute are void as violating the rule against perpetuities. This occurs with reference to legal remainders in realty. A contingent legal remainder must vest, if it vests at all, upon the termination of the precedent life estate. Hence, where an estate is devised to A for life, and on his death to such of his children as reach twenty-five, the limitation is a contingent remainder and is not too remote. A's children may not reach twenty-five until more than twenty-one years after his death; but unless they have reached twenty-five at A's death they will never take, since a remainder must take effect upon the termination of the precedent estate, if at all. If A's children were to take the legal remainder when they reached five years of age, the result would be the same, for that age must be reached before A's death or the remainder cannot vest. If the remainder relates to equitable interests in the first case above, it is void as being too remote, because it may not vest in interest within lives in being and twenty-one years: See *Festing v. Allen*, 12 Mees. & W. 279; *Abbiss v. Burney*, 17 Ch. Div. 211.

Rule against Perpetuities—Vested Gifts.—A more difficult problem arises when the devise is vested and the possession only is deferred until a period which violates the rule against perpetuities. As already stated, the rule against perpetuities is concerned only with the commencement of estates, and if the estate vests indefeasibly in interest within the time allowed, although possession may be postponed, the gift is not void as violating the rule. This was brought out in the case of *Loring v. Blake*, 98 Mass. 253. Here an estate was devised to trustees to be set apart equally for the children of the testatrix, to pay the income to each child during life, and after its death to hold for the use of its children, and their heirs, if no husband or wife of such child should survive, in which case the

income was to be paid to such surviving husband or wife during his or her life. In commenting on the interest the children took, and whether the limitation violated the rule against perpetuities, the court said: "It was possible that a child of Mrs. Blake [the testatrix] might marry a person not in being at the time of her decease; and that such person might be the survivor of the marriage. In that case, a limitation of her estate, not to take effect until after the decease of such unborn person, would be in violation of the rule against perpetuities; because it would not be supported by the definite measure of a life or lives in being and twenty-one years. By Mrs. Blake's will the ultimate enjoyment and possession of the estate is thus postponed. The rule, however, regards, not the possession, but the title or absolute right. If that vest within the prescribed period, the rule is satisfied. . . . The enjoyment is postponed to enable the surviving husband or wife to receive the income during life; but the title, the absolute interest in remainder, is fixed at the decease of the child of Mrs. Sally Blake": See *Whelan v. Reilly*, 3 W. Va. 597. The case of *Davenport v. Harris*, 3 Grant Cas. 164, might, from its opinion, indicate that the time of vesting in possession was the determining period. But the terms of the will indicate that the gift did not vest in interest until a too remote period. In the Massachusetts case cited above it must be noted that the children who were to take were determined, both in number and by name, absolutely upon the death of the person to whom the first life estate was given, the proportion of each one's share was in consequence determined at the same time, and within the limits of the rule. In other words, the share of each member of the class vested in interest indefeasibly within the proper period. In order that a vested share, which is not to come into possession until a future time, shall escape the consequences of the rule against perpetuities, the vesting must be indefeasible, and the fact that an invalid gift over is made does not render it indefeasible, the divesting gift over being bad. For example, take a gift to the children of A, to be divided equally among them when they attain the age of twenty-one. The gift vests immediately in such of A's children as are living at the testator's death, but, since it is subject to open and let in children born before any one of A's children becomes twenty-one, the gift is defeasible to the extent of the shares taken by the after-born children. Since, however, the number of A's children is determined at his death, the amount of each of such child's share will be determined within one life in being, and naturally the gift is valid. On the other hand, take a gift to the grandchildren of A, to be divided equally among them when they become twenty-one. It is clear that if there are any grandchildren living at the death of A they would take vested interests, if they took anything, since the gift is not contingent on their reaching twenty-one. A, however, may have children born after the death of the testator. These subsequently born children may have children born after the death of

A, and after the death of everyone else who was alive at the testator's death. Hence it may not be determined how many belong to the class of grandchildren, and into how many shares the estate must be divided until more than twenty-one years after lives in being. The grandchildren living at the testator's death take vested interests, if anything, but they are not indefeasible interests, but are subject to be divested *pro tanto* upon the birth of other grandchildren. The amount that each grandchild is to take cannot be ascertained until all the children of A are dead, and to await that time may postpone the period of indefeasible vesting of a particular share beyond the time allowed. The gift, therefore, to all the grandchildren would be void, and the shares of those living at the death of the testator would suffer the same fate as the shares of those subsequently born.

In the case of *Matter of Charlier*, 22 N. Y. App. Div. 71, it was held that, where a gift vested indefeasibly in the members of a class within the statutory period, a further direction that their shares should not be paid until a certain time was unobjectionable: See *Vanderpoel v. Loew*, 112 N. Y. 167. In *Earnshaw v. Daly*, 1 App. D. C. 218, where the gift to children was vested in interest at the death of the testator, and the amount of each share was determined at that time, a postponement of enjoyment until the youngest of the children became of age did not violate the rule against perpetuities. *Wilber v. Wilber*, 60 N. Y. Supp. 1064, recognizes the distinction we have attempted to draw. It was admitted that the grandchildren living would take vested interests, but the interests were not indefeasibly vested, for "if the title in the living grandchild was subject to open and let in after-born grandchildren, then the power of alienation would, by possibility, be suspended. It would be uncertain, until the death of the two sons, whether there would be other grandchildren." The language here specifies the power of alienation, instead of the rule against perpetuities, but, so far as this point is concerned, it is immaterial whether we say that the rule against perpetuities was violated because the interest could not vest indefeasibly until all members of the class were determined, or whether we say that the power of alienation was suspended, since, until all the members of the class were determined, it would not be known who could convey a complete title. We must not, however, fail to grasp this fundamental distinction between the rule against perpetuities and the rule against restraints on alienation, viz., that the rule against perpetuities is concerned only with the vesting of estates, and, if estates are indefeasibly vested, the rule against perpetuities, or more properly speaking, the rule against remoteness of vesting, is not violated. The rule against restraints on alienation is concerned only with the alienability of estates, and not at all with their vesting. Estates may be vested indefeasibly in various persons, and yet the estate may be tied up and be inalienable because these same persons cannot combine and transfer a perfect

title. It is the confusion of these two rules that is responsible to some extent for the apparent chaos in the decisions on this subject. An example will put the matter more clearly. Suppose a devise is made of property in trust to pay the rents and profits in a certain way, and to divide the estate among the children of A when they shall attain the age of twenty-one. It seems plain that, if A has any children living at the death of the testator, they will take vested interests, but not indefeasible interests, since their interest is likely to be divested to the extent of shares taken by after-born children. Their shares will become vested in interest and amount upon the death of A, for at that time the number of his children is permanently fixed. But, while vested, is the property alienable? It is in a sense, for vested and contingent interests are both alienable. But, in the sense of transferring the property in interest and possession, this cannot be done, and the property is effectively tied up. The trustees cannot convey without a breach of their trust, and a conveyance by the beneficiaries (the children) alone would not release the property from the trust. So, while the property becomes vested in the members of the class within the proper time, it is not alienable in the full and complete sense that the rule requires. The case of *In re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, points out this distinction as clearly as any case we have seen. It was contended that the members of the class took an estate in that case which was vested and alienable, and therefore it was a valid estate. But the court replied to this: "It may be first suggested that all expectant estates, whether vested in interest, or contingent with a vested right, or entirely contingent, pass by succession, will, and transfer, like present estates and interest: Civ. Code, sec. 699. But the fact that such interests may pass does not relieve from the operation of the rule, unless there are persons in being who, by combining and conveying all their distinct interests created by the original grant or devise, can pass an absolute interest in possession. Conceding that the future interest of the beneficiaries is vested in the sense in which remainders are spoken of as vesting, and the interest would thus be alienable, it still is not such an interest as would by transfer carry an absolute interest in possession. As is pointed out by the court in *Vanderpoel v. Loew*, 112 N. Y. 167, the vesting of an estate involves alienability only so far as that particular estate is concerned. The fact that a given remainder is vested renders it absolutely alienable, so far as it is itself concerned, but the absolute fee may at the same time be inalienable. Therefore, to convey this absolute interest in possession the beneficiaries would be compelled to unite with their conveyance that of the trustees in whom the fee is vested. But the trustees cannot convey until the expiration of twenty-five years. An attempt by them to convey before that time would contravene the trust, and be a void act. . . . So, even though the beneficiary should be a remainderman under such a trust as this,

he still could not alienate the land within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries. Hence, the question whether the interest of the beneficiaries is contingent or vested is here of no possible moment. The absolute alienability required by section 715 of the Civil Code does not imply vesting, and it affords no escape from the operation of the rule, because the interest which the beneficiaries take may be relieved from uncertainty as to persons or event. When so relieved, the interest may be said to be vested. But it is not such a vesting nor yet such an interest as removes the bar of the statute, since all of the interests and estates, contingent and vested, cannot convey the fee, so long as the terms of the trust from which alone their interests are derived stand in the way. The perpetuity here does not result from too remote limitations or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alienate for a period not tolerated by the law."

There are probably jurisdictions in which the only qualification is that the estate shall vest indefeasibly in the members of a class within the proper time, and it is not required that the entire property shall be alienable absolutely within the period allowed. Such seems to be indicated by *Loring v. Blake*, 98 Mass. 253. Here the estate was indefeasibly vested in the children as a class within the proper time, subject to a life estate. If the estate had not been held by trustees the matter would be simple, for the children and the holder of the life estate could convey an absolute title in possession if they were the only parties concerned. The presence of trustees would seem to make this impossible. The inference, therefore, is that the absolute alienability of the entire property is not essential, the absolute vesting of all the estates in the property alone being necessary.

The distinction we have been treating seems to have been lost sight of in *Matter of Charlier*, 22 N. Y. App. Div. 71. However, if the trust terminated, as seems to have been held, at the death of the wife, then an absolute title to the entire property could have been conveyed within the period allowed by the rule.

The case of *Thomas v. Gregg*, 76 Md. 169, furnishes a good example. Two wills were construed together as one will, and resulted in property being disposed of in this wise: Property was devised in trust for the benefit of the testator's daughter, with remainder to the issue of her body living at her death, the trustees to hold such property for the benefit of her children until their death. The daughter had a child born after the decease of the testator. Now the children of the daughter were determined upon her death, and the share of each was determined at the same time. Each child's share was thus indefeasibly vested at that time if the gift were valid. But the trustees were to hold the property

for the benefit of the children until their death. The last one to die might be the one born after the death of the testator, which time also might be more than twenty-one years after the death of all those living at the testator's death. The disposition was therefore void as to all the children in the class. And while the share of each child was indefeasibly vested within the proper time, yet the trust was to continue beyond the forbidden period, and while it continued no absolute conveyance could be made. We have already noticed the assertion that is sometimes made that, if the time fixed for payment would carry the class beyond the limits of perpetuity, members coming into existence after the testator's death will not be admitted, and have seen that this restriction has no application to contingent gifts, the vesting in interest of which is postponed. Is the restriction applicable where the gift confers a vested interest? For example, a devise to trustees to hold for the use of A for life, and after his death to hold for A's grandchildren, to be received by them when they each become twenty-five. The interest of the grandchildren living at the testator's death is obviously a vested one. The time of distribution is clearly beyond the limits of the rule against perpetuities. If after-born grandchildren are intended to share in the distribution, the gift to all must be void, for the share of some of those born after the testator's death may not vest until a too remote time. Can, then, the gift be divided between those grandchildren living at the testator's death to the exclusion of those born later? *Kevern v. Williams*, 5 Sim. 171, holds this may be done. Without saying that this case is wrongly decided, it has been shown by Gray, in his work on Perpetuities, that there is but one ground on which this case can be sustained as being correctly decided. This is, that when a person is entitled absolutely to property, any provision postponing its transfer or payment to him, is void, in pursuance of the general doctrine that it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest. Such a provision is void without any regard to the rule against perpetuities. In this case the grandchildren took absolute vested interests. The restraints imposed upon the reception of the fund were nugatory. "Therefore all of the brother's grandchildren who were alive at the death of the widow were entitled at once to their shares. That was the time of distribution. The class was then closed, and no after-born grandchildren could take, entirely apart from any question of remoteness." This case and *Elliott v. Elliott*, 12 Sim. 276, were cited with hesitating approval in *In re Coppard's Estate*, 35 Ch. Div. 350. We use the facts in this last case as better for the purpose of illustration. Here property was given to trustees to hold for the benefit of the children of A, to be vested interests in them, the property to be given them on their attaining twenty-five. If this latter clause is a direction or restraint so repugnant to the estate granted that it is nugatory and may be disregarded, and the

estate becomes vested entirely free from the restraint imposed, then the decision is correct. We venture to assert, however, that if the estate had been made distributable to the nephews and nieces on their becoming twenty-one, so that the time of distribution would have been within lives in being and twenty-one years, and hence within the limits of the English rule, the decision would have been different, and children born after the testator's death and before the period of distribution would have been allowed to share in the estate. This assertion is borne out by the case of *Oppenheim v. Henry*, 10 Hare, 441, where a bequest was made to trustees to hold in trust for grandchildren, to be divided equally among them at the end of twenty years after his death. It was held that the grandchildren took vested interests, but that all born after the testator's death and before the end of the twenty years were entitled to take. If the direction postponing payment was nugatory, *Oppenheim v. Henry*, 10 Hare, 441, is erroneously decided. The fact that the period of distribution was within the limits of the rule against perpetuities must have been controlling. The decision is unquestionably in conflict with *Kevern v. Williams*, 5 Sim. 171.

It is questionable whether the doctrine of *Kevern v. Williams*, 5 Sim. 171, is correct, for the reason that the rule that a restraint repugnant to the estate granted is nugatory and may be disregarded is only true where no one else is interested in the property. But the rule does not apply where anyone else is interested in the property. Now, in the case of a gift to a class, all the members of the class are interested in the property, whenever they may be born, and the testator intended to include as many as possible within his bounty. We have already shown that a vested interest is defeasible when after-born children may take a part of it, and it can only be rendered indefeasible when the number of the class is finally determined. The cases are numerous where, when a gift to a class is made, to be paid when the eldest attains a certain age, with a gift over upon failure to attain that age, all members of the class coming into existence before the eldest reaches the required age are allowed to share. The gift over prevents the gift to the class from being indefeasible: See *Andrews v. Partington*, 3 Brown Ch. 401; *Barrington v. Tristram*, 6 Ves. 345; *Whitbread v. St. John*, 10 Ves. 152. But a gift to a class is as indefeasible when after-born children are to share as when there is a gift over. Though it is not divested to the same extent, it is divested in proportion to the number of after-born children.

Admitting that the decision in *Kevern v. Williams*, 5 Sim. 171, is correct, it can only apply to those cases where the restriction as to future payment is nugatory as being repugnant to the estate granted. That there may be annexed to a vested gift unlawful restrictions, see *Philadelphia v. Girard*, 45 Pa. St. 9, 84 Am. Dec. 470. However, the ordinary type of a devise in trust to divide the property at some subsequent period is not such a condition annexed to the

gift as may be rejected as void because repugnant to the interest conveyed. This was distinctly held in *In re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97. The case of *Kevern v. Williams*, 5 Sim. 171, should, therefore, not interfere with the current of American decisions, however binding it may be deemed on the English courts. Then, by adopting the rule of *Kevern v. Williams*, 5 Sim. 171, there is the obvious difficulty of adjusting the share to which each child capable of taking is entitled. By making the gift vest both in interest and possession at the testator's death, which the testator never intended, the amount which those living will receive is likely to be much in excess of that which the testator designed.

There is still another method by which the rule of perpetuities is evaded, which is by a construction of the will itself. The rule of *Kevern v. Williams*, 5 Sim. 171, is not one of construction, but a mandatory rule of law by which void conditions are rejected. By construction, however, the testator's intention is preserved to some extent, though in some cases the construction is clearly unwarranted. Such a case exists where a devise is made to the children of A, to be divided among them equally when the youngest attains the age of twenty-one. In those jurisdictions where estates need not vest until twenty-one years after lives in being, the gift would be good, and the devise would be distributed when the youngest of A's children, whenever born, should become of age. But in jurisdictions where the gift must take effect within lives in being, or where accumulations, if provided for, must be distributed within the same period, the rule is different. Here everything depends on what the testator meant by the youngest child. If nothing but the general term is used, we have already seen that the correct meaning is the youngest, whenever born, because the testator intended to provide for all the members of that class. If, on the other hand, words are used that render the intent doubtful, then the gift may be saved by construing the term to mean the youngest living at the testator's death. So in the case of *In re McBride's Estate*, 152 Pa. St. 192, words were used that reasonably permitted such a construction, and the gift, otherwise void, was saved. In *Cogan v. McCabe*, 23 Misc. Rep. 739, 52 N. Y. Supp. 51, however, there were no words used in the will which might by any possibility have meant that the testator referred to his youngest child then living, the construction adopted was forced, and the real intent of the testator was thwarted. The case is not good law, and such a construction, it is submitted, should not be, and would not be likely to be followed elsewhere. In any case where words are employed which permit of a construction that the testator meant his youngest child then living, the construction places the period of distribution at the time when such youngest attains the requisite age as twenty-one. This being the period of distribution, it follows logically that any child who at the time of the distribution answers the description of the class is thereby a member of the class and en-

titled to share in the estate, whether he was born after the death of the testator or not. Logically, this position cannot be assailed, and the right of any member who belongs to the class at the time of distribution to share in such distribution cannot be denied, although born subsequent to the death of the testator: *In re McBride's Estate*, 152 Pa. St. 192. It is thus seen that such a construction results in cutting down the membership of the class only in part and at the same time the gift is saved.

It must be observed that in those jurisdictions where a perpetuity can be created only for two lives in being, as in New York, a construction allowing the trust to exist and keeping the property intact until the youngest (or oldest) becomes of age, does not necessarily violate the rule. While the trust is to exist until the youngest becomes of age, the restraint on alienation is to endure only during the life of the life tenant and until the youngest becomes twenty-one. It is thus measured by two lives in being, for the death of the youngest before reaching twenty-one would of necessity put an end to the trust, unless the age of twenty-one was a time limit, regardless of the existence of such child: See *Van Cott v. Prentice*, 104 N. Y. 45. See *Will of Butterfield*, 133 N. Y. 473, where the time appointed for distribution was vital to the existence of the trust, and in consequence the gift was void as to the entire class: See, also, *Haynes v. Sherman*, 117 N. Y. 433. But if the gift were to all of a class living at the testator's death when they should become twenty-one, the age refers to all, not to a definite one, and the trust would be to endure for more than two lives in being, and in consequence must be held void.

Rule against Perpetuities—Independent Gifts.—Care must be observed to distinguish those cases in which, while a gift is made to children, the gifts are independent and separate, and for this reason each gift or each set of gifts must be judged by itself in determining whether it violates the rule against perpetuities. When gifts are made to several persons by one description, but the amount of the gift to one is not affected by the existence or nonexistence of the others, then the gifts are separable. Such gifts are not strictly gifts to a class, and the mere designation of the beneficiaries by some general name, as "children," does not of itself make it a gift to a class. For example, if a testator bequeaths five hundred dollars to each of the children of A who attain the age of twenty-five, the gift to each is separable and must be considered by itself in determining whether the rule against perpetuities is violated or not. In the example cited, those born after the testator's death cannot possibly take; those living at his death may. It is immaterial whether the gift is of a specific sum or of a share, if the number of shares is definitely determined within the limits of the rule. The case of *Catlin v. Brown*, 11 Hare, 372, is a well-considered case on this question. It was said here that where there was a devise of "property to each member of a class, and the gift to each is

wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law." In this case a devise was made to A for life, with remainders for life to all the children of A equally, with remainders in fee to the grandchildren, the grandchildren to take only the share of their respective parent. As to the children there was but one class, those of A, who must come into being during the life of A. The share which each of these children should take was, therefore, determined absolutely and indefeasibly within one life in being. But as to the grandchildren there were as many classes as there were children of A, since the grandchildren took only the share of their own parent. Now, suppose A to have had four children, B and C, who were living at the testator's death, and D and E, born subsequently. The shares of B, C, D, and E are determined absolutely during the life of A, since A's children must all be born during his life. But, as to the grandchildren, the situation is different. The children of B and C must all be born within the space of two lives in being at the testator's death, viz., the lives of A and B, or of A and C. The shares which these grandchildren, the children of B and C, would take must, in consequence, be determined within two lives in being at the testator's death, for the children of B and C, taking only the share of their parent, are in no wise affected by the existence of children of D and E. Hence the shares of the children of B and C, the children of each forming a separate and distinct class, will be determined and will vest indefeasibly within the limits of the rule, in this case within two lives in being. The children of D and E suffer a different fate. D and E may not be born until more than twenty-one years after the testator's death, in which case none of their children might be born within two lives in being and twenty-one years. The shares of these children, therefore, might not be determined until more than twenty-one years beyond lives in being, the rule is violated, and they cannot take. The shares which they take, being simply the portion given their parent, are independent of the gift to the children of B and C, and for this reason the two gifts do not meet with the same treatment.

The leading case on this question is *Storrs v. Benbow*, 2 Myne & K. 46. See, also, *Griffith v. Pownall*, 13 Sim. 393; *In re Russell*, [1895] 2 Ch. 698; *Vanderpoel v. Loew*, 112 N. Y. 167; *Hill v. Simonds*, 125 Mass. 536; *Dorr v. Lovering*, 147 Mass. 530.

To summarize, then, the results of our discussion relating to the rule against perpetuities: If the devise is contingent and will not vest in interest until a period not allowed by the rule, the gift is void, and no member of the class can take, though some may have been in existence at the time of the testator's death. If the devise gives a vested interest which is indefeasible, with a postponement of payment which is nugatory, because repugnant to the estate

granted, the void condition will be ignored and the gift vest immediately in those members of the class living at the testator's death. If the devise gives a vested interest, but the vesting is not indefeasible by reason of a divesting gift over or of the possibility of a divesting to allow after-born children to share, then, if the number of shares can be definitely determined within the limits of the rule, the gift is good and all born afterward will be allowed to share; except that where a trust term is created which renders it impossible to convey an absolute title in possession within the limits of the rule, then the entire gift is void and none can take, though the number of shares would be definitely determined within proper limits. If the devise is vested, but not indefeasibly so, and the number of shares cannot be ascertained within the limits of the rule, the gift is void and none may take. In this latter case, if the will contains language capable of a reasonable construction which will permit of a distribution within the limits of the rule, such construction may be adopted and all members of the class coming into existence before the period of distribution will be allowed to share. Lastly, if the gift, though made to "children" or other class, is separable and independent and not a real gift to a class, the share of each member or of each class of members will be determined separately on its own merits.

FEAREY v. O'NEILL.

[149 MISSOURI, 467.]

EVIDENCE.—THE WRITTEN STATEMENT OF THE GRANTOR in a trust deed, made out of court long after the trustee had taken possession under the deed, is not competent evidence against the latter, nor is it admissible to discredit the evidence of a witness for the party offering it, in the absence of evidence showing that the witness made the statement as an artifice to entrap or mislead the party into calling such witness, nor unless this purpose is disclosed at the time when the offer is made.

TRIAL—INSTRUCTIONS.—The sufficiency or correctness of instructions must be gathered from them as a whole, and not by critically separating them, and then attacking the detached sections in detail.

TRIAL—INSTRUCTIONS.—It is not necessary that the meaning of an ordinary word, such as the word "fraudulent," should be defined in an instruction.

DEEDS OF TRUST—PRESUMPTION OF ACCEPTANCE.—As between the parties to a deed of trust made for the benefit of creditors, the beneficiaries are presumed to accept it, if beneficial to them.

DEEDS OF TRUST—VESTING OF TITLE IN TRUSTEE—ASSENT OF BENEFICIARIES.—If a conveyance is made directly to a trustee for the benefit of creditors, the legal title passes to the trustee without further evidence of assent on the part of the beneficiaries.

DEEDS OF TRUST—VESTING OF TITLE IN TRUSTEE—DEFENSE AGAINST ATTACHMENT.—A trustee who claims possession of a stock of goods, conveyed to him as trustee for the benefit of certain creditors, establishes a complete defense against an attaching creditor by introducing in evidence such deed of trust, proving his acceptance thereof for the benefit of such creditors, his demand for payment, a default in the payment of the debts due such creditors, and the actual delivery of possession of the goods by the grantor to him. Proof of the acceptance of him as trustee by the preferred creditors is not necessary.

APPELLATE PRACTICE.—FAILURE TO INSTRUCT the jury in a civil case on propositions not requested by counsel does not constitute error available on appeal.

APPELLATE PRACTICE—THEORY AT TRIAL.—If an attachment is not controverted, but conceded throughout the trial, the parties to the action must be held to that theory on the appeal.

Karnes, Holmes & Krauthoff, for the appellant.

J. A. Guthrie and Ellis, Reed, Cook & Ellis, for the respondent.

472 GANTT, P. J. This is an action of replevin for a stock of shoes which Albo Miller had owned as a retail merchant at No. 101 East Twelfth street in Kansas City, Missouri, up to December 3, 1894. On that day, being indebted to various persons for goods sold to him, and for money loaned, and to his clerks and employes for services, he conveyed, by a deed of trust in the nature of a chattel mortgage to George D. Fearey and his successors in said trust and their assigns, all of said stock, with the right upon default to take immediate possession of said goods and sell the same in any manner he should see fit, and, after paying first the costs of executing said trust, he should pay the indebtedness secured by said deed in proportion to the amounts of the said notes and the balance, if any, to said Miller.

This deed was duly executed and acknowledged and recorded on December 3, 1894, at 12:05 P. M. All of said notes being due, demand was made and default occurred on said day, and thereupon the trustee, Fearey, at once took possession of said goods and locked the store, and put up notices that the stock was in his possession under said deed.

That afternoon, after plaintiff had taken possession, the defendant, O'Neill, as sheriff of Jackson county, attached said stock under a writ of attachment in a suit by Barton Brothers against Albo Miller, and said goods were afterward replevied in this action by the trustee against the sheriff.

On the trial in the circuit court, the verdict of the jury and judgment of the circuit court was for the plaintiff for possession

of the property and one cent damages. Other facts will be noted in the further discussion of the case.

473 1. The written statement of Albo Miller, made long after the plaintiff, Fearey, had taken possession of the goods under the sale and transfer, was incompetent against the grantee or trustee: *Weinrich v. Porter*, 47 Mo. 293; *Steward v. Thomas*, 35 Mo. 202; *Albert v. Besel*, 88 Mo. 150.

No question is made of the soundness of this general principle, but it is now claimed the said statement was offered for the purpose of contradicting and impeaching Miller, whom defendant had called as a witness and whose testimony differed from said statement. No such purpose was indicated when the evidence was offered. Moreover, a party is not allowed to discredit his own witness, that is, he cannot introduce evidence whose sole purpose is to discredit his witness: *Brown v. Wood*, 19 Mo. 475; *Chandler v. Fleeman*, 50 Mo. 239; *Chafin v. Dodson*, 111 Mo. 195; *Dunn v. Dunnaker*, 87 Mo. 597; 1 *Greenleaf on Evidence*, sec. 442.

There was no evidence tending to show that Miller used any artifice to entrap or mislead the defendant into calling him as a witness. No showing of surprise by affidavit or otherwise was made taking the case out of the general rule already announced, and it was properly excluded. *State v. Burks*, 132 Mo. 374, is not authority for admitting this statement made out of court.

2. The court in behalf of plaintiff instructed the jury as follows: 1. The court instructs the jury that any fraudulent intent that Albo Miller might have had in making the deed of trust in evidence is not enough to vitiate it. It devolves upon the defendant in this case to show by tangible evidence that the plaintiff, Fearey, participated in such fraudulent intent, if any, and purposely aided Albo Miller to defeat his other creditors by covering up the property of Albo Miller in some improper way, to the use and benefit of the said Miller. 2. The jury are instructed that although fraud need not be proven by direct testimony, and may be inferred from **474** circumstances, still it will never be presumed, but must be proven by some tangible and substantial facts in evidence, from which it may be fairly inferred; and in this case the burden is on the defendant to show, by a preponderance of the testimony, that Albo Miller fraudulently executed the chattel deed of trust offered in evidence, and that the plaintiff, Fearey, participated in such fraud; and, if the facts and circumstances shown in evidence are as consistent with an honest purpose on the part of said Fearey as with the dishon-

est one, then it is your duty to believe his purpose honest. 3. The court instructs the jury that, even though Miller was in failing circumstances, he had a right to prefer any one or more of his creditors to the exclusion of the rest, although his doing so operated to defeat his other creditors in the collection of their claims; and if the plaintiff, Fearey, took the deed of trust in evidence, for the purpose of securing the debts therein named, and did not know of and participate in some fraudulent design of the said Miller, if he had any, the deed of trust is valid and you must find for the plaintiff. To which action and ruling of the court in giving said instructions the defendant at the time duly excepted and still excepts.

It is urged that these instructions are erroneous, in that they leave it to the jury to determine what is a "fraudulent intent" or "fraudulent design," without defining those words or declaring what facts would constitute a "fraudulent intent" or "design." In other words, that the word "fraudulent," in a case like this, is a technical word, which ought not to be used in an instruction without definition. This exception strikes us as extremely hypercritical. We have had occasion before this to remark that such objections as this challenge the utility of jury trials. A jury which under the evidence in this case could not comprehend the foregoing instructions would certainly be incompetent to ⁴⁷⁵ try any issue intelligently. We are unwilling to believe that the juries of Jackson county are so ignorant that they do not know the meaning of plain words in daily use like these.

Moreover, the sufficiency or correctness of the instruction must be gathered from it as a whole, and not by critically separating it and then attacking the detached sections in detail: *Alberger v. White*, 117 Mo. 347.

It is not necessary that the meaning of ordinary words and phrases, used in their usual and conventional sense, should be defined in instructions. Attempts to define ordinary words or phrases such as those criticised in this case more often mystify than elucidate: *Warder v. Henry*, 117 Mo. 530; *Muehlhausen v. St. Louis R. R. Co.*, 91 Mo. 332; *Cottrill v. Krum*, 100 Mo. 397, 18 Am. St. Rep. 549.

3. The contention is now made that the deed of trust to plaintiff did not become operative until the beneficiaries therein accepted it, and that the demurrer to the evidence should have been sustained.

No demurrer to the evidence was interposed at the close of

plaintiff's case, and, if it had been, it should have been overruled.

The plaintiff had read in evidence the deed of trust to plaintiff as trustee, conveying the legal title and possession of said goods to him, and had proven the actual delivery thereof to said trustee, and his acceptance thereof for the preferred creditors, the demand for payment and default in the notes, the delivery of the possession of the goods by the grantor Miller to the trustee, his giving notice of the change of possession and locking up the store.

No question could arise about the acceptance of this deed by the trustee under this evidence, and the presumption, up to this stage, at least, was that it was accepted by the beneficiaries as it was for their benefit. A prima facie case was thus established, and no demurrer to the evidence was ⁴⁷⁶ interposed. *Kuh v. Garvin*, 125 Mo. 547, did not change the universally accepted rule that, as between the parties to the deed, the beneficiaries were presumed to accept it if beneficial to them: *Tompkins v. Wheeler*, 16 Pet. 118; *Brooks v. Marbury*, 11 Wheat. 78.

In *Kuh v. Garvin*, 125 Mo. 547, the decision rested upon these facts. Various chattel mortgages were made by the debtor or mortgagor to different creditors directly. Several of said mortgagees by their agent accepted these mortgages made for their benefit, and as to them their mortgages were sustained in preference to the attaching creditors, but it also appeared that two of the mortgagees lived at a distance and were entirely ignorant of the execution of the mortgages to them, and, before notice of their execution reached them, the attachment intervened, and, on the principle that it takes two parties to make a contract and the delivery of the mortgage was essential to its efficacy as a conveyance, it was held that the presumption of their assent could not and did not supply the place of their assent, which was necessary to make a valid contract and conveyance, and did not defeat the intervening lien of the attachment. But that case is inapplicable here. Here the deed was made directly to a trustee for the benefit of these preferred creditors, and the legal title passed at once to him and was accepted by him for the benefit of these creditors.

The conveyance was absolute and contained no expressions requiring the assent of these creditors. In such cases, even in those jurisdictions which hold the assent of creditors necessary where the conveyance is made directly to them, it is ruled that where the conveyance is made directly to a trustee for the benefit

of creditors, the legal title passes for the benefit of creditors without further evidence of assent on the part of the beneficiaries: *Cunningham v. Freeborn*, 11 Wend. 240; *Tompkins v. Wheeler*, 16 Pet. 118; ⁴⁷⁷ *Brooks v. Marbury*, 11 Wheat. 78; *Halsey v. Whitney*, 4 Mason, 206; *Furman v. Fisher*, 4 Coldw. 626, 94 Am. Dec. 210.

Said the supreme court of the United States in *Brooks v. Marbury*, 11 Wheat. 97: "Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee."

In this case, no doubt whatever can exist of the delivery to the trustee for the beneficiaries prior to the attachment. But even if proof of assent be necessary, defendant called the plaintiff as a witness, and must abide the result of his testimony: *Dunn v. Dunnaker*, 87 Mo. 597; *Chandler v. Fleeman*, 50 Mo. 239; *Claflin v. Dodson*, 111 Mo. 195.

He testified that he sold Miller three of the bills of goods represented by the notes of Miller in the mortgage, that he was the local agent at Kansas City of said wholesale houses; that as such Miller came to him, and said those firms had been kind to him, and he wanted to protect them; that the deed of trust was made to him for their benefit, and as their agent he accepted and recorded it, and took possession of the goods.

This was ample evidence of an authorized acceptance by the three largest creditors established by defendant himself, and this is sufficient although there were some preferred who did not prove an affirmative acceptance.

But we do not think defendant is in position to invoke the doctrine for which he contends. This is a civil case, and it is firmly established that in civil cases a failure to instruct on propositions not requested by counsel does not constitute error. Mere nondirection is not error. Defendant in none of his instructions asked any declaration of law on the necessity for proof of acceptance or the effect the deed would ⁴⁷⁸ have if not accepted by the beneficiaries, or upon the relative right of those who did and those who did not accept it.

There being substantial evidence of acceptance by three of the largest beneficiaries, this, of itself, would have answered the present contention, and, if defendant desired to contest the right of

others, he should have asked to have that issue submitted to the jury, but did not, and it is not before us for review.

We have treated the case as if the attachment proceedings were in the record. They are not set out in full, but sufficient appears to show that the attachment was not a controverted fact, but conceded throughout the trial, and parties must be held to the theory on which they try their cases in the circuit courts.

Finding no error we affirm the judgment.

Sherwood and Burgess, JJ., concur.

In *Kingman v. Cornell-Tebbetts etc. Co.*, 150 Mo. 282-309, the supreme court, sitting in Bank, again decided that a delivery of a properly executed deed of trust to a trustee for preferred creditors and his acceptance thereof, inures to the benefit of all the beneficiaries therein named, and their acceptance of the terms of the trust is presumed, unless within a reasonable time after notice they disaffirm or refuse to accept the grant. Those creditors who accept the provisions of the trust, before other unsecured creditors intervene by attachment, are entitled to the benefits arising under the grant, but the rights of those who do not so accept must be subordinated to the right of other attaching creditors. The court, in passing upon this question, said:

"After full deliberation and consideration, we have concluded that the delivery of the deed of trust to Harding, as trustee for the three secured creditors and his acceptance of it, constitutes a good delivery of the deed of trust, which inured to the benefit of all the beneficiaries therein named, and, as it was not disclaimed by any of them within a reasonable time after they had notice of it, their acceptance thereof must be presumed.

"This question has lately been considered by division No. 2, in the case of *Fearey v. O'Neill*, 149 Mo. 467, ante, p. 440. In that case it appeared that one Miller was indebted to various persons for goods sold, money loaned, and services rendered. He gave a deed of trust on his stock of goods to Fearey, as trustee, 'with the right upon default to take immediate possession of said goods and sell the same in any manner he should see fit, and, after paying first the costs of executing said trust, he should pay the indebtedness secured by said deed in proportion to the amounts of the said notes, and the balance, if any, to said Miller.' The notes were not paid, and the trustee took possession of the stock. The same day an attachment was levied on the goods, and the trustee replevied them. There was no acceptance by any of the beneficiaries. Division No. 2, speaking through Gantt, C. J., held that the trustee's acceptance for the preferred creditors, with the presumption of its acceptance by the beneficiaries, made out a *prima facie* case, and that, '*Kuh v. Garvin*, 125 Mo. 547, did not change the universally accepted rule that as between the parties to the deed, the beneficiaries were presumed to accept it if beneficial to them [*Tompkins v. Wheeler*, 16 Pet. 118; *Brooks v. Marbury*, 11 Wheat. 78].' and further held that *Kuh v. Garvin*, 125 Mo. 547, was inapplicable to the case, adding: 'Here the deed was made directly to a trustee for the benefit of these preferred creditors, and the legal title passed at once to him and was accepted by him for the benefit of those creditors. The conveyance was absolute, and contained no expressions requiring the assent of these creditors. In such cases, even in those jurisdictions which hold the assent of creditors neces-

sary where the conveyance is made directly to them, it is ruled that, where the conveyance is made directly to a trustee for the benefit of creditors, the legal title passes for the benefit of creditors, without further evidence of assent on the part of the beneficiaries': *Cunningham v. Freeborn*, 11 Wend. 240; *Tompkins v. Wheeler*, 16 Pet. 118; *Brooks v. Marbury*, 11 Wheat. 78; *Halsey v. Whitney*, 4 Mason, 206; *Furman v. Fisher*, 4 Cold. 626, 94 Am. Dec. 210. Said the supreme court of the United States in *Brooks v. Marbury*, 11 Wheat. 97: 'Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee.'

"As early as the case of *Major v. Hill*, 13 Mo. 248, it was held in our state that: 'Where a debtor, without the knowledge of the creditor, conveys to a trustee to secure the debt, it is valid, unless, within a reasonable time after the fact comes to the knowledge of the creditor, he disclaims it.' This was followed in *Pearce v. Dansforth*, 13 Mo. 360; *Ensworth v. King*, 50 Mo. 477-483."

INSTRUCTIONS—CONSIDERATION OF AS A WHOLE.—All instructions should be considered together and construed with reference to each other; and if a charge, as a whole, is correct, the judgment will not be reversed, although an extract from the charge, taken by itself, is erroneous: *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384, and note.

INSTRUCTIONS—MEANING OF ORDINARY WORDS.—It is not necessary that the meaning of ordinary words and phrases, such as "diligent inquiry," used in their usual and conventional sense in instructions to juries, should be defined or explained: *Cottrill v. Krum*, 100 Mo. 397, 18 Am. St. Rep. 549.

EVIDENCE.—DECLARATIONS OF GRANTOR made subsequent to his deed cannot be received in evidence to invalidate it: *Dudley v. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368. But declarations made by the grantor to the grantee of a deed of trust after the execution of the deed of trust, but before the grantee had accepted it, are evidence to alter or contradict the trust: *Drum v. Simpson*, 6 Binn. 478, 6 Am. Dec. 490.

TRUSTS.—A BENEFICIARY'S ASSENT TO a trust for his benefit will be presumed, in the absence of evidence to the contrary: *Stockard v. Stockard*, 7 Humph. 303, 46 Am. Dec. 79, and note.

TRUSTS FOR BENEFIT OF CREDITORS—ATTACHMENT OF.—No creditor can, by attachment or garnishment, take any part of an estate, held by an assignee in trust for the benefit of creditors under a valid assignment, out of his hands, and apply it to the payment of his debt: *Moody v. Carroll*, 71 Tex. 143, 10 Am. St. Rep. 734; note to *Marx v. Parker*, 43 Am. St. Rep. 855.

APPEAL.—OBJECTIONS NOT TAKEN AT THE TRIAL cannot be considered on appeal: *O'Brien v. Stambach*, 101 Iowa, 40, 63 Am. St. Rep. 368; *Greene v. Greene*, 49 Neb. 546, 59 Am. St. Rep. 560; *Dennis v. Caughlin*, 22 Nev. 447, 58 Am. St. Rep. 761.

APPEAL.—FAILURE TO GIVE AN INSTRUCTION, when no request is made for it, is not error: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803; *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 38 Am. St. Rep. 592.

McREYNOLDS v. GRUBB.

[150 MISSOURI, 382.]

DEEDS—DELIVERY—PLEADING.—An allegation in a pleading that a deed was executed and recorded is equivalent to an allegation that it was delivered.

DEEDS—PRESUMPTION OF DELIVERY.—If a deed is executed and recorded, no formal delivery is necessary, as delivery, in such case, is presumed.

DEEDS BY MARRIED WOMEN—REFORMATION.—A deed to land made by a married woman, and void because defectively executed by her, or because it does not describe the land intended to be conveyed, or because of her incompetency to contract in connection therewith, or for any other reason, cannot be corrected by a proceeding in equity, even though she has received and enjoys the consideration therefor.

DEEDS BY MARRIED WOMEN—AFFIRMATION OF VOID.—A void deed executed by a married woman with regard to her land, the title to which she holds in fee, may be affirmed by her after she becomes discoverd; but it must be done in writing and in the form prescribed by law. Her assent to it after coverture, or her parol adoption of it, or her expressions of a willingness to make it valid, or a new deed, do not make it valid. To have such effect it must be reacknowledged and delivered.

DEEDS BY MARRIED WOMEN—ESTOPPEL.—In an action of ejectment by a married woman to recover the possession of land conveyed by her under a void deed, the grantee may defend on the ground that, by reason of the fact that she has received the consideration for the land, and has stood by and seen him making permanent and valuable improvements thereon, she is estopped to recover.

DEEDS BY MARRIED WOMEN—REFORMATION—RIGHT TO REGAIN POSSESSION.—In an action against a married woman to reform her void deed to land, for which she has received the consideration, she cannot recover the possession, though the suit falls.

Harrison & Harrison, for the appellant.

McReynolds & Halliburton, for the respondents.

³⁵⁶ **BURGESS, J.** This suit was instituted in the circuit court of Jasper county by plaintiffs against the defendant, for the purpose of having corrected a deed executed by defendant and her husband, Joel Grubb, in his lifetime, to Jacob Grubb, by which they attempted to convey to him a certain tract of land in said county, to wit, twenty-six and one-half acres, a part of the northeast quarter of the southeast quarter of section 9 in township 27, and the northwest quarter of the southeast quarter of section 17 in township 27 of range 31, except three-fourths of an acre in the southwest corner, but by ³⁵⁷ the mistake of the scrivener who wrote the deed, as alleged, the land in section 17

was described as the northeast quarter of the southeast quarter, when it should have been described as the northwest quarter of the southeast quarter of said section 17, township and range, except three-fourths of an acre in the southwest corner of said forty acre tract.

The deed was executed on the ninth day of March, 1877. Joel Grubb died in October, 1889. Plaintiffs claim title under Jacob Grubb.

The trial resulted in a judgment and decree in favor of plaintiffs correcting the mistake in the deed. After unsuccessful motion for new trial and in arrest, defendant appeals.

Joel Grubb was married three times. By his first wife he had five children, viz., America McReynolds, Sarah A. Montague, John Grubb, and V. H. Grubb, and one by his last wife, the defendant, all of whom were living in March, 1877. At that time he was the owner in fee of the northwest quarter of the southwest quarter of section 10, township 27, range 31, except two and one-half acres thereof. This was the homestead. He also owned twenty-six and one-half acres, a part of the northwest quarter of the southeast quarter of section 9 in township 27 of range 31. Joel Grubb and the defendant were the owners of, and had the legal title to, the northwest quarter of the southeast quarter of section 17, township 27, of range 31, except three-fourths of an acre in the southwest corner thereof, as tenants in common, Joel Grubb owning three-fourths thereof, and the defendant one-fourth.

In March, 1877, Joel Grubb made an arrangement with defendant, by which it was agreed that they would deed all the land he owned and the land he and she owned to Jacob Grubb, and that said Jacob Grubb should immediately deed ³⁵⁸ to the defendant, for her and her child, the home place, to wit, northwest quarter of the southwest quarter of said section 10, and it was further agreed that Jacob Grubb was to hold the title to the northwest quarter of the southeast quarter of section 17 and twenty-six acres in section 9, township 27, range 31, until the death of said Joel Grubb, when these tracts were to be divided between the five children of Joel Grubb's first wife, and, for the purpose of binding Jacob Grubb to make said conveyances, Jacob Grubb executed his note to Joel Grubb for five hundred dollars, with the agreement and understanding that with the making of said conveyances to his brothers and sisters said note was to be given up and canceled, the only consideration therefor being to bind Jacob Grubb to make the conveyances.

In the deed from Joel Grubb and his wife to Jacob Grubb, made in pursuance of this arrangement, there was a mistake in the description of the land, in this, that where they attempted to convey the northwest quarter of the southeast quarter of section 17, except three-fourths of an acre in the southwest corner of said quarter, it was described as the northeast quarter of the southeast quarter, a forty to which Joel and Rhoda C. Grubb never at any time had any title. Rhoda C. Grubb acquired her interest in the forty acres in section 17 as an heir at law of her father, Matthew Payne, and Joel Grubb acquired his interest therein by the purchase of the interest of other heirs in said estate, and in partition of said estate this land was set off to them with other land, which made them respectively own, the defendant one-fourth and Joel Grubb three-fourths of said eighty.

After the death of Joel Grubb in October, 1889, the five children of the first wife of Joel Grubb went to his residence where the defendant lived, and there talked over the property of the estate and the manner of dividing the same. At that time John Grubb had a chattel mortgage on ³⁵⁹ all the personal property of Joel Grubb; there was also a note for one hundred dollars signed by the defendant, in favor of Joel Grubb. These five heirs and the defendant at that time mutually agreed that John Grubb should deliver up and cancel his chattel mortgage, and the defendant should have all the personal property belonging to the estate of Joel Grubb, and retain the home place, thirty-seven and one-half acres, for herself and minor child; that Jacob Grubb's note for five hundred dollars should be delivered to him, and the note of defendant, Rhoda C. Grubb, for one hundred dollars should be delivered to her, all of which was done at that time. That the northwest quarter of the southeast quarter of section 17, township 27, range 31, should be deeded to America McReynolds, Sarah A. Montague and V. H. Grubb; that twenty-six acres in section 9 should go to John Grubb and Jacob Grubb, and immediately thereafter on October 21, 1889, Jacob Grubb made a deed to America McReynolds and Sarah A. Montague and V. H. Grubb conveying the northwest quarter of the southeast quarter of section 17, township 27, range 31. On the same day America McReynolds and Sarah A. Montague bought of V. H. Grubb his interest in said forty and received a deed therefor, and afterward, by agreement, divided said land between themselves, each taking twenty acres and made deeds March 14, 1891, in accordance therewith. All these deeds conveyed said land

by the correct description. America McReynolds and Sarah A. Montague immediately took possession of their respective parts of this forty acres and commenced improving the same, and put thereon lasting and valuable improvements at a considerable expense, with the full knowledge of the defendant, Rhoda C. Grubb. Matters ran along in that shape until the fall or winter of 1895, when the defendant commenced making some claims to this forty acres of land and this suit was commenced to correct said deed.

³⁶⁰ At the close of the evidence the court, at the request of plaintiffs, found the facts to be as follows: "1. That defendant, Rhoda Grubb, owned an interest in the tract of land in controversy as her separate property; 2. That it was the intention of Joel Grubb and Rhoda Grubb to convey the northwest quarter of the southeast quarter, except three-fourths of an acre in the southwest corner, instead of the northeast quarter of the southeast quarter, except as described in the deed; 3. That defendant, Rhoda Grubb, after the death of Joel Grubb, ratified the deed as intended to have been made by the said Joel Grubb, by her acts and transactions with the children of Joel Grubb by his first wife, and is bound by such ratification."

At the request of defendant the court found the fact to be as follows: "1. That at the time the deed in controversy was made, Joel Grubb and Rhoda C. Grubb (this defendant) were husband and wife; that Joel Grubb died in October, 1889." And refused to find: "2. That Joel Grubb and Rhoda C. Grubb were the owners of the west half of the southeast quarter by judgment in partition. 3. That the eighty acres were partitioned by parol between Rhoda C. Grubb and Joel Grubb; that afterward Joel Grubb traded the south forty (his share) with John Warden for the northeast quarter of the southeast quarter. Warden had deeded it direct to Jacob Grubb and also made Jacob Grubb a deed for the northeast quarter of the southeast quarter, including twenty acres of other land, said Jacob Grubb paying him the difference in value in the two forty acres of land, and that there is no evidence showing a mistake made by the parties to the deed. ³⁶¹ 4. That this forty acres was not her separate estate, and there was no agreement made with her to convey this forty acres of land, nor any interest she had in it whatsoever. 5. That said deed was a gratuitous grant, and was never delivered to nor accepted by said Jacob Grubb, under whom plaintiffs claim. 6. That the land claimed was not her separate property under the Revised Statutes of 1879, section 3296, which was the law gov-

erning the rights of the parties in this case. 7. The defendant occupied said northwest quarter of the southeast quarter until nineteen days after his death, October 2, 1889, to October 21, 1889, at which time (October 21, 1889), plaintiffs took possession of said land against the wish and protest of the defendant. 8. The court finds from the evidence that Rhoda C. Grubb (the defendant) was one of the daughters of Matthew Payne; that Matthew Payne departed this life intestate prior to 1872; that the defendant was one of ten heirs of said Payne; that this defendant at that time inherited her interest in the forty acres in controversy; that by the partition papers offered in evidence the defendant's said interest and her husband's interest which he has purchased, to-wit, two shares and two-thirds of one share in said estate, were set off in one tract, it being eighty acres, the west half of the southeast quarter of section 17, township 27, range 31, Jasper county, Missouri; and said interest of the said Rhoda C. Grubb was not her separate estate, but was her legal estate inherited as aforesaid."

It is first insisted by defendant that the petition fails to state a cause of action, in that it does not aver that the deed in question was delivered to Jacob Grubb, and is bad for the further reason that it shows upon its face that plaintiff was a married woman at the time the deed was made in March, 1877.

³⁶² The petition alleges that on the ninth day of March, 1887, the said Joel Grubb and his wife, the defendant herein, made a warranty deed which is recorded; that on the twenty-first day of October, 1889, said Jacob Grubb, the grantee therein named, conveyed a part of the land therein described to two of his sisters and one brother. So that the only reasonable construction that can be put upon these allegations is that the deed was delivered to and accepted by the grantee therein named. Moreover, the allegation that the deed was executed and recorded was equivalent to an allegation that it was delivered. No formal delivery was necessary, as the law will presume a delivery under such circumstances: *Kane v. McCown*, 55 Mo. 181.

The next question presented is the vital one in this case, and upon its solution depends the result. Defendant having acquired her interest in the land which it is claimed by plaintiffs was intended to be conveyed by the deed in question by inheritance after her marriage with Joel Grubb, which was prior to the adoption of section 6864 of the Revised Statutes of 1889, it was not her separate property, and could only have been conveyed by her and her husband jointly, and then only by deed signed and

acknowledged by them as provided by section 2, page 934, of the Revised Statutes of 1872. Therefore, as the deed does not describe the land intended to be conveyed, as to Mrs. Grubb it passed no title, either legal or equitable. But plaintiffs insist that as defendant received in consideration for the land which was intended to be conveyed to Jacob Grubb, for the benefit of Joel Grubb's five children by his first wife, a deed to the home place of her and her husband, Joel Grubb, and still retains the same, that in equity and good conscience the deed in question should be corrected so as to conform to the intent of the grantors. As the land intended to be conveyed by defendant and her husband by the deed in question was not her separate property, and she could only have conveyed her interest therein in the manner ³⁶³ prescribed by statute, it seems to follow that a deed defectively executed by her or which does not describe the land intended to be conveyed cannot be corrected by proceeding in a court of equity. Such proceeding can only be maintained against a party competent to contract, and the defendant herein possessed no such power at the time of the execution of the deed.

In *Shroyer v. Nickell*, 55 Mo. 264, *Sherwood, J.*, speaking for the court, said: "The reformation of deeds and of contracts, whether sealed or otherwise, executed or merely executory, is one of the most familiar doctrines pertaining to equity jurisprudence. But it is to be observed of this power of reforming instruments that it always has for its basis the fact that the parties thereto are capable of making a valid contract. This capability cannot be, in general, affirmed of a married woman. The only exception to this rule of incapacity, so far at least as it concerns her individual rights, is where a feme covert contracts with regard to her separate estate; for in respect to that she is held a feme sole by courts of equity. But, beyond this, the original inability to make a binding contract still exists in all its ancient vigor, save where modified by statute. It was one of the fundamentals of common law that the contract of a feme covert was absolutely void, except where she made a conveyance of her estate by deed duly acknowledged, or by some matter of record; and this could only be done after private examination as to whether such conveyance was voluntarily made; and our statutory mode, whereby the deed of a married woman is executed and acknowledged, is but substitutionary of the common-law method in this regard. This is the only change that our statute has wrought": *Whiteley v. Stewart*, 63 Mo. 360; *Pearl v. Hervey*, 70 Mo. 167; *Dameron v. Jameson*, 71 Mo. 97; *Rush v. Brown*, 101 Mo. 586; *Brown v. Dressler*, 125 Mo. 589.

³⁶⁴ It is true, as argued by plaintiffs, that a void deed executed by a married woman with regard to her land, the title to which she holds in fee, may be affirmed by her after she becomes discovert, but it must be done in writing and in the form prescribed by law. Her subsequent assent to it even after coverture, or her parol adoption of it, or expressions of a willingness by her to make it valid or a new deed, do not make it so: *Stewart on Husband and Wife*, sec. 366; *Adams v. Buford*, 6 Dana, 406. To have such an effect it must be reacknowledged and delivered.

In *Price v. Hart*, 29 Mo. 171, it was in effect said: If such a deed can be adopted or set up by a mere parol declaration, made by a married woman after the removal of her disability of coverture, it would seem to let in all the evils which the statute was designed to guard against.

While these observations, and the authorities cited are more particularly with respect to the defective acknowledgment of deeds executed by married women than the misdescription of lands intended to be conveyed by them, the same rule applies with equal, if not greater, force to the latter class, that is, that a court of equity has no power to correct the mistake.

In *Martin v. Hargardine*, 46 Ill. 324, it was said: "Even if the certificate of acknowledgment had been correct in point of form, the court had power to apply it to any other lands than these described in the deed. The difference between correcting a deed as to the husband, or, if he is dead, as to the heirs, and to the wife or widow, is this: as to the husband, the deed is made in execution of a contract between the grantor and grantee, and if it does not properly express the contract as really made, either as to the description of the lands or otherwise, it can be corrected by a court of chancery on the making of satisfactory proof. So, if the contract is executed on the part of his purchaser, by the payment or tender of the purchase money in compliance with its terms, ³⁶⁵ and the vendor refuses to convey, the court will compel a conveyance. But the wife is incapable of making a contract which will bind her as to her dower. She can relinquish it to the grantee of her husband, but only in the manner pointed out by the statute. The execution of a deed by signing, sealing, and delivering it is not sufficient, much less an agreement to execute a deed. The deed must not only be signed and sealed, but it must be acknowledged in a special manner, before an officer designated by the law, and a certificate must be placed by such officer upon the deed, showing such acknowledgment to have been made in the mode required by the statute. The character

and effect of this transaction cannot be changed by subsequent proof. If the deed describes the northeast quarter instead of the southeast, as was intended, and the wife executes and acknowledges the deed before the mistake is corrected, all that can be said is, that she has relinquished her dower in the lands described in the deed, and in none other, and although she may have agreed to relinquish it in another tract, and may have supposed she was doing so, yet, if she has not done so, the court has no power of compelling her. Her agreement does not bind her, and the court cannot take her relinquishment of dower in one tract and apply it to another in which she never has relinquished. This would make for her a new deed." It follows that the court was without authority to make the decree which it rendered.

It may be in an action of ejectment by defendant for the possession of the land (which, if she does not bring voluntarily, she may be compelled to do under the statute or be debarred from ever setting up or claiming title thereto) that, by reason of the fact that she received from her husband the agreed consideration for her interest in the land, and having settled with the Grubb heirs upon that theory, and then having stood by and seen them making lasting and ³⁶⁶ valuable improvements thereon, she would be estopped in ejectment from a recovery.

She is certainly not, however, entitled to recover possession of the land in this suit.

For these considerations, we reverse the judgment.

Gantt, P. J., and Sherwood, J., concur.

DEEDS—DELIVERY BY RECORDING.—In some jurisdictions a deed duly recorded is sufficient, if not conclusive, evidence of delivery: Note to Parker v. Salmons, 65 Am. St. Rep. 297. The grantor's recording a deed expressing the receipt of the purchase money is prima facie a valid delivery: Note to Prignon v. Dausset, 31 Am. St. Rep. 918. Compare Cravens v. Rossiter, 116 Mo. 338, 38 Am. St. Rep. 607, and note thereto. As to what constitutes delivery of a deed, consult the monographic note to Brown v. Westfield, 53 Am. St. Rep. 537-556.

DEEDS BY MARRIED WOMEN—ESTOPPEL.—If, after a void conveyance to a railroad company of the right of way over her land, a married woman stands by and allows the road to be built upon her land without objection, she cannot require the company to tear up its track and quit the premises, but she is entitled to damages: Louisville etc. Ry. Co. v. Stephens, 96 Ky. 401, 49 Am. St. Rep. 303, and note. See, too, Central Land Co. v. Laidley, 32 W. Va. 134, 25 Am. St. Rep. 797.

DEEDS BY MARRIED WOMEN—REFORMATION OF.—A married woman may be compelled to correct a mistake in the execution of a deed; and such deed, if duly executed, may be reformed in equity by correcting a mistake in the description of the property

therein, so as to make the deed express what the parties intended it should: *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526, and note; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, and note. *Contra*, *Bowden v. Bland*, 53 Ark. 53, 22 Am. St. Rep. 179; *O'Malley v. Ruddy*, 79 Wis. 147, 24 Am. St. Rep. 702.

DEEDS OF MARRIED WOMEN—RATIFICATION OF.—Where a married woman's deed made during coverture is void, she cannot ratify by mere admissions or recitals in other deeds or pleadings, or by other acts in pais. She can ratify it only by attaching a proper and sufficient acknowledgment thereto, or by properly executing another deed: *Central Land Co. v. Laidley*, 32 W. Va. 134, 25 Am. St. Rep. 797.

LANDER v. ZIEHR.

[150 MISSOURI, 403.]

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE.—A voluntary deed by a husband to his wife, without any pecuniary consideration moving from her, is void as to all his existing creditors.

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE—INHERITED PROPERTY.—If property is inherited by the husband, or acquired by his means during coverture, a voluntary conveyance thereof to his wife is fraudulent as to all of his existing creditors.

FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS.—A voluntary conveyance, fraudulent as to existing creditors of the grantor, is not necessarily fraudulent per se as to his subsequent creditors, and whether it is fraudulent as to them is to be determined by all the circumstances.

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE—SUBSEQUENT CREDITORS.—If property is inherited by a husband during coverture, a voluntary conveyance thereof to his wife, with intent to contract debts, and a design to avoid their payment by the conveyance, is fraudulent and void as to subsequent creditors of the husband. Such fraud may be shown by prior debts, the insolvency of the debtor at the time of the conveyance, or, though solvent at that time, rendered insolvent by such conveyance, or a design or purpose to hinder, delay, and defraud those to whom he is about to become indebted.

FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS—CHANGING CREDITORS.—A mere change of creditors during the continuance of a debt does not relieve against a fraudulent conveyance. If the debtor pays off debts existing at the time of such conveyance, by borrowing an equal amount from subsequent creditors, the conveyance is void as to the latter, especially when the transaction involves actual and intentional fraud.

FRAUDULENT CONVEYANCES—RENTS AND PROFITS. If a conveyance is held to be fraudulent under a complaint praying for general relief, the rents and profits of the property conveyed go to the creditors who bring suit to set aside the conveyance.

C. K. Hart, M. M. Crandall, and A. W. Mullins, for the appellants.

J. M. Johnson, J. A. Arbuthnot, and S. P. Huston, for the respondent.

407 GANTT, P. J. This is an appeal from a decree of the circuit court of Linn county adjudging certain conveyances of the defendant, John Ziehr, to his wife, Emma Ziehr, and to Judge W. H. Brownlee, as trustee for her, to be fraudulent and void.

The trustee is a mere formal party and has no interest in the cause save as the holder of the legal title. One of the deeds purports to have been made by John Ziehr to his wife on December 22, 1891, and recorded March 17, 1892, and conveys the residence of John Ziehr in Brookfield and a brick building known as his saloon property, for the consideration of love and affection. The other deed, made long after the levy of the attachment, and long after the accruing of the debts for which the property was sold, was to W. H. Brownlee, as trustee, for Mrs. Ziehr, and was recorded February 23, 1895.

John Ziehr inherited the said real estate from his father in 1890. Previous to this time he and his brothers, George and William, were in partnership in the coal, wood, beer, and ice business in Brookfield, and also engaged in draying. He ⁴⁰⁸ was married to his codefendant, Emma Ziehr, in 1889. She brought him no property and was possessed of none in her own right. In 1890, he received as his share of his father's estate a residence worth \$3,000, the saloon property worth \$6,000, and an icehouse worth about \$500. In the partition of the property the defendant John Ziehr obligated himself to his mother, brothers, and sisters to the amount of \$1,700, and to secure one of the brothers \$450 mortgaged the icehouse for that sum, and subsequently sold it for \$35, subject to that mortgage. To liquidate the claims of the others he made an overdraft of \$800 on the Bank of Brookfield and continued to owe his mother \$200 in 1892

Outside of the foregoing real estate John Ziehr owned some personal property, several horses and mules, drays, and personal effects, all of which was afterward sold under a chattel mortgage for \$350. He was a partner in a saloon and obtained \$320 for his share therein in January, 1892. He testified, however, that he kept \$500 in money on hand at his home as "a reserve." He testified also to book accounts due him to the amount of \$714, but, on cross-examination, it appeared these were so largely offset by counter-accounts of merchants and others to whom he was indebted, that they could scarcely be called assets.

After the dissolution with his brothers, John Ziehr, the defendant, continued in the ice, coal, and beer business alone, and it was soon apparent that his brothers were selling better ice than he was, and he began to look about for an artificial ice plant.

He had little or no capital invested in his business at this time. He bought coal and beer on time, and relied on selling it to meet his payments. No one from his evidence can approximate what his real financial condition was for several years. He says he was making money, but the result demonstrates ⁴⁰⁹ that he was either mistaken or has secreted his property. He owed the coal men and the brewing company of whom he bought considerable money, and he made them payments, but it appears that when he paid them he increased his indebtedness to the Bank of Brookfield, which permitted him to overdraw on the faith of his ownership of property.

The evidence does not show the exact date of the delivery of the deed he made directly to his wife, and which bore the date of December 22, 1891, but it does appear that between that date and its record, March, 1892, he was indebted to the Bank of Brookfield from \$700 to \$1,000, which debt was a running account and increased from time to time until the spring of 1894, when it reached \$2,400, and has never been paid. On the 22d of December, 1891, he owed Anheuser-Busch \$137, and this sum increased to \$460, before the record of the deed in March, 1892. The indebtedness increased until the spring of 1894, when it amounted to \$1,800, and has never been paid. This business was done at Brookfield, and these creditors did not know that he had put to record the deed to his wife, at Linneus, the county seat. It is entirely clear that this credit was extended to him on the assumed ownership of the dwelling-house and saloon property.

The evidence of his partner, Gordon, tends to establish that in October, 1891, John Ziehr conceived the plan of erecting an artificial ice plant, which he ascertained on a visit to St. Louis would cost \$20,000. With this purpose in view, he conveyed the only available real estate he had to his wife, and by this deed practically rendered himself insolvent. After making this deed he continued to be the ostensible owner of this real estate as if it was his own. He gave it in to the assessor for 1891, 1892, and 1893 as his own. He paid the taxes out of his own money, insured it in his own name, and paid for the insurance out of his own funds to the local agency in Brookfield. Gordon,

his tenant, knew nothing of the transfer ⁴¹⁰ and continued to pay him the rent monthly, and John Ziehr receipted him in his own name therefor. He says himself he used these rents in his own business and never paid his wife a cent. He kept no account of it with her. He contracted for expensive improvements and paid for them out of his own money. In 1894, for the first time, he caused the property to be assessed to his wife and had it insured in her name, and never, until pressed by De Graw, who had loaned him \$6,000, did he state that the property belonged to his wife. In the meantime he had become indebted to the amount of \$13,000.

When he and Gordon went to De Graw to borrow of him \$6,000, De Graw told them that he would not take security on any unfinished building like the ice plant, but would advance the money and take as security his saloon property and other property. When this statement was made, John Ziehr assented, and did not by word or deed indicate that he did not own the property, but said that they wanted to get the money along from time to time, as they needed it, and when he got the full amount of \$6,000 he would secure it as desired. Ziehr was regarded as the responsible party, and, according to the evidence, it was fairly understood between De Graw, Ziehr, and Gordon that Ziehr was to secure the \$6,000 by deed of trust on his saloon property and other property sufficient to make ample security. This was in the spring of 1894. And on the strength of these representations and his apparent ownership of this substantial property, De Graw, through Linn County Bank, from time to time advanced to Ziehr and Ziehr & Gordon \$6,000, and, when security was asked by De Graw on the saloon property as promised, John Ziehr pleaded business engagements from time to time, but promised to give the security and have it fixed up as soon as possible, and when pressed by Arbuthnot, acting for Bank of Brookfield and De Graw, he claimed that his wife objected to signing the deed of trust. These pretexts and excuses by Ziehr continued ⁴¹¹ for some time, and, when at last De Graw and Arbuthnot proposed to accept the deed without the signature of his wife, he could "trim" no longer and announced to them "that his property was in his wife's name." So, with the debt of the Anheuser-Busch Brewing Company, it was created and the credit given to him on the faith of his ownership of these two pieces of property. He had no other tangible property available to creditors.

John Ziehr's claim on the trial that he was solvent until the

spring of 1894, when he commenced the construction of the ice plant, and that he lost his wealth in the ice plant venture is completely exploded by a consideration of the record in this case. He only claims to have invested in the ice plant \$3,500 in all. Gordon says he invested only \$3,300, including the work he did and his draying.

He got from the Bank of Brookfield, \$2,400; from Anheuser-Busch, \$1,846; from Linn County Bank, \$1,000—making a total of \$5,200. This sum of \$5,200 he got personally. This sum is aside from the \$5,000 got by Zehr & Gordon from De Graw, and is aside from the \$2,000 or \$3,000 debts contracted by Gordon & Ziehr and their indebtedness to Fred W. Wolff for machinery. He claims that his dray, ice, coal, and beer business was profitable, that he was making money all this time, but, according to his own statement, he only claims to have invested in the ice plant \$3,500 of his own individual money. This would leave him a net reserve of the money obtained by him of Bank of Brookfield, Anheuser-Busch, and De Graw alone between \$1,700 to \$2,200, individually to himself.

Suits were brought by the Anheuser-Busch Company against John Ziehr for \$1,846 and the Linn County Bank for the sum of \$5,000. The Bank of Brookfield and also the ⁴¹² Linn County Bank had also brought suits by attachment against Ziehr for \$2,400 and \$1,000 and interest, both of which last-mentioned suits were transferred to the Sullivan county circuit court on the application of the defendant, John Ziehr. Under these attachments, the property described in the petition had been levied upon, and the same property was levied upon and sold under the judgments obtained by Anheuser-Busch Brewing Company and Linn County Bank, above mentioned, in the Linn county circuit court, and at the sheriff's sale of said property, by agreement of all these creditors, the respondent, Harry Lander, became the purchaser of the property described in the petition for the benefit of all these creditors, and he thus prosecutes this suit.

As already stated, the circuit court rendered a decree that the deed to the homestead was not fraudulent, but that to the saloon property was void as to his creditors, and confiscated the rents paid by Gordon after the attachment. It is to reverse that decree this appeal is prosecuted.

1. The deed from John Ziehr to his wife Emma, of date December 22, 1891, on its face declares the consideration therefor was only love and affection, and was therefore a pure gratuity,

but, in addition to this recital, it is made entirely clear that the wife had in no way contributed to the acquisition of this property. She had only been married to defendant John Ziehr about two years when the deed was executed. She brought him no estate whatever by her marriage, being entirely without means. This property was not the product of the joint savings or labor of John Ziehr and his wife, but was inherited from his father. Being voluntary and without any pecuniary consideration moving from the wife, it was void as to all existing creditors of John Ziehr: *Jordan v. Buschmeyer*, 97 Mo. 94.

It having been shown and conceded that the deed was made to the wife of property inherited and acquired by his means during coverture, the transaction, as to all existing ⁴¹³ creditors, was fraudulent in law: *Patton v. Bragg*, 113 Mo. 595, 35 Am. St. Rep. 730; *Bump on Fraudulent Conveyances*, 2d ed., 200.

The case presents no feature which requires a court to uphold the deed in equity, though it was void at law: *Woodsworth v. Tanner*, 94 Mo. 124.

While the deed was fraudulent at law because voluntary as to existing creditors, it has long been held in this state that a voluntary conveyance as to subsequent creditors, although the party be indebted at the time of its execution, is not fraudulent per se as to them, but the fact whether it is fraudulent or not is to be determined by all the circumstances: *Pepper v. Carter*, 11 Mo. 542; *Payne v. Stanton*, 59 Mo. 158; *Frank v. Caruthers*, 108 Mo. 569.

What, then, are the circumstances which would justify a court in holding a conveyance fraudulent as to subsequent creditors? The proof of prior debts, the insolvency of the debtor at the time of the conveyance, or, though solvent, rendered insolvent by the conveyance he makes, a design or purpose to hinder, delay, or defraud those to whom he is about to become indebted, are some of the marked indicia of fraud. In a word, an intent to contract debts and a design to avoid the payment of such debts by the conveyance. It was pointed out by this court in *Snyder v. Free*, 114 Mo. 360, that the statute simply requires "an intent to defraud" to be shown. Applying these tests to the facts of this case, and we have a grantor, not only indebted at the time of the conveyance, but that conveyance confessedly gratuitous and voluntary of all the property to which creditors would naturally look for the payment of their debts. That conveyance is kept off of record for three months. It is true that this deed was afterward recorded at the county seat, but it must be borne in

mind that John Ziehr lived in Brookfield and the property was all there, and that he continued to use it and control it just as he always had, and that, as a matter of fact, it was not ⁴¹⁴ suspected by De Graw when he loaned him \$6,000 that the property was in the wife's name. It requires no corroborative evidence to demonstrate that De Graw or any other prudent investor would not have loaned John Ziehr \$6,000 had he known that the very property on which he was to be secured was in Ziehr's wife's name. Nor did the record of this deed under the circumstances relieve it of its fraudulent character: Bump on Fraudulent Conveyances, 4th ed., sec. 293, and cases cited.

Much stress is laid by counsel for defendants upon the fact that the items due the Brookfield Bank at the date of the conveyance were afterward paid, but as to this contention we answer that a great deal depends upon the mode in which this is done. Proving that prior debts have been paid amounts to nothing, if, as in this case, it appears Ziehr was contracting other debts to an equal amount. Any other rule would simply permit a debtor to take the property of subsequent creditors and give it to his grantee. A mere change of creditors while the debt continues will not cheat the statute: Bump on Fraudulent Conveyances, 4th ed., sec. 296, and cases cited; Brown v. McDonald, 1 Hill Eq. 304; Taylor v. Coenen, L. R. 1 Ch. Div. 636; Madden v. Day, 1 Bail. 340, 341; Antrims v. Kelly, Fed. Cas. No. 494; 4 Nat. Bank. Reg. 189. That John Ziehr kept up his credit by paying old debts with the proceeds of goods purchased and overdrafts from time to time we think is abundantly established.

But that this evidence makes out a case of actual, intentional fraud can scarcely be questioned. John Ziehr had learned that an ice plant would cost him nearly or quite \$20,000. He knew he had no other property on which he could possibly expect a loan to erect so costly an establishment, except his real estate. His subsequent conduct convicts him of a deliberate purpose to defraud. He testifies himself that, aside from this property in dispute, he had nothing at all, because the \$3,500 which he attempts to say he had has vanished ⁴¹⁵ and left not a trace behind. When he came to De Graw to borrow the money, he permitted De Graw to believe he still owned the saloon property. He admits De Graw told him he would not take a lien on the ice plant. Indeed, at that time he did not even own the land on which it was later constructed.

It is absolutely incredible that De Graw would have considered the loan at all if he had not supposed Ziehr owned the saloon

property, as he had nothing else with which to secure De Graw.

He was exercising every indicia of ownership. When he told De Graw he would give him ample security he knew he had nothing but this property. His shuffling and procrastinating when De Graw required the deed of trust which he had promised to give are in harmony with his deception throughout.

Without recapitulating all the evidence, it is sufficient to say that it would be against all reason and conscience to permit John Ziehr, through his wife, to continue to enjoy this property as he has from the execution of the deed, after having contrived to obtain the money of his creditors to a large amount on the faith of his ownership, and cover it up in his wife's name, when she had not invested a farthing in it. The courts of equity cannot countenance a scheme like this.

The circuit court properly found that it was John Ziehr's property when it was attached and sold, and that plaintiff, as the trustee of an express trust, had a right to have the deeds to his wife canceled and held for naught, and, under the prayer for general relief, the rents and profits were properly adjudged also to plaintiff for the creditors.

The decree is affirmed.

Sherwood and Burgess, JJ., concur.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.—A voluntary conveyance from a husband to his wife is void as to his sureties on his previously executed official bond for all defaults occurring during the time for which the bond was given: *Ames v. Dorroh*, 76 Miss. 187, 71 Am. St. Rep. 522. A voluntary deed made by a creditor to his wife and son is void as to his creditors: *Gentry v. Lanneau*, 54 S. C. 514, 71 Am. St. Rep. 814.

FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS. A voluntary deed made by a debtor to his wife and son cannot be set aside at the instance of a subsequent creditor having notice, without some proof of actual fraud: *Gentry v. Lanneau*, 54 S. C. 514, 71 Am. St. Rep. 814. Subsequent creditors can avoid a fraudulent conveyance only upon proof of actual fraud against them, though the grantor was indebted at the time it was executed: *Notes to First Nat. Bank v. Maxwell*, 69 Am. St. Rep. 73; *Gilliland v. Jones*, 55 Am. St. Rep. 216.

FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS. A voluntary conveyance, made with intent to hinder, delay, and defraud creditors, is void as against subsequent, as well as prior, creditors, though the grantee did not know of the fraudulent intent of the grantor: *Gilliland v. Jones*, 144 Ind. 662, 55 Am. St. Rep. 210. But a subsequent creditor cannot avoid a conveyance of his debtor, not intended or operating to defraud him, on the ground that it was made to defraud existing creditors: *Fullington v. Northwestern Importers' etc. Assn.*, 48 Minn. 490, 31 Am. St. Rep. 663. The question of fraud, in such cases, must be determined from all the circumstances. The fact of indebtedness at the time of a voluntary

conveyance raises no irrebuttable presumption of fraud as to subsequent creditors: *Gentry v. Lanneau*, 54 S. C. 514, 71 Am. St. Rep. 814.

FRAUDULENT CONVEYANCES—CHANGING CREDITORS. If debts exist when a fraudulent conveyance is made, a change in their form, or in the persons to whom they are due, is immaterial. Subsequent creditors from whom means were obtained to pay off the antecedent creditors are entitled to treat the conveyance as void: *Note to Hagerman v. Buchanan*, 14 Am. St. Rep. 745.

FRAUDULENT CONVEYANCES—RENTS AND PROFITS.—A fraudulent grantee of property holds it in trust for the creditors of the grantor, and, like any other trustee, must hold it intact for their benefit. In a suit to compel him to account for rents received before the conveyance was set aside, an allowance may be made in his favor for money paid out by him for taxes, necessary repairs, and interest on valid pre-existing liens, but not for insurance effected in his name and for his benefit: *Loos v. Wilkinson*, 118 N. Y. 485, 10 Am. St. Rep. 495, and note.

RIDGEWAY v. HERBERT.

[150 MISSOURI, 606.]

DEEDS OF MINORS—DISAFFIRMANCE.—Whether or not the maker of a deed and lease was a minor at the time of their execution, and whether he disaffirmed them after becoming of age, are issues in an action at law, triable by a jury. Whether such instruments were obtained by fraud is an issue in equity, triable by the chancellor.

ACTIONS—PRACTICE.—If an answer in an action at law admits plaintiff's cause of action and sets up a purely equitable defense, it converts the whole case into a suit in equity, triable by the chancellor; but if such answer sets up two defenses, one equitable and the other legal, plaintiff is still entitled to a jury trial, unless the equitable defense prevails.

DEEDS OF MINORS—SETTING ASIDE—MISREPRESENTATIONS.—A deed executed by a minor may be avoided by him upon his arriving at the age of majority, though he represented himself to be of age at the time of the execution of the deed, and thereby misled the other party to his disadvantage.

DEEDS OF MINORS—SETTING ASIDE—ESTOPPEL.—If a minor brings suit to set aside his deed on the ground of fraud, and in his petition alleges that he was of age when it was executed, he is not thereby estopped in a subsequent suit from petitioning that such deed be set aside on the ground of his minority.

DEEDS BY MINORS—SETTING ASIDE—WASTE OF CONSIDERATION.—If a minor executes a deed, receives the consideration, and wastes it, he may avoid the deed upon arriving at the age of majority without making restitution.

DEEDS OF MINORS—DISAFFIRMANCE.—If a minor executes a deed and wastes the consideration received therefor while he is a minor, the making of a deed to another person as soon as he arrives at the age of majority is a sufficient disaffirmance of the first deed.

DEEDS OF MINORS—SETTING ASIDE—FRAUD.—If a spendthrift minor of very dissipated habits, whose character is well known to the grantee, executes a conveyance of his life interest in land for a grossly inadequate consideration, which he wastes during his minority, he may, on arriving at the age of majority, have the conveyance set aside on the ground of fraud, without restoring the consideration.

S. C. Price, for the appellant.

Hall & Hall, for the respondents.

609 VALLIANT, J. This is an action of ejectment to recover sixty acres of land in Grundy county. The petition is in the usual form. The answer admits that defendants are in possession, and sets up a state of facts showing that plaintiff is entitled to recover, unless the leases and deed under which he claims are rendered invalid by reason of the further facts pleaded in the answer, which are, substantially, that on December 2, 1891, George W. Moberly, who is the common source of title, was the owner and in possession of the land, and on that day he executed a lease for a term of five years from March 1, 1892, to **one Martin**, at the yearly rental of **610** one hundred dollars, and on December 31, 1891, Moberly, for the consideration of fifty-five dollars, assigned his interest as landlord in the lease to the plaintiff and J. D. Ridgeway, the latter afterward assigning his interest to the plaintiff; that afterward, on February 1, 1892, Moberly executed a lease to plaintiff for five years from March 1, 1897, for a total rental of fifty dollars, and three days later executed a deed to the plaintiff for the land for fifty dollars; that at the time he made those leases and the deed, Moberly was under twenty-one years of age; that after he came of age he disaffirmed those transactions and made a deed conveying the land to Williams and Linney, under whom, by mesne conveyances, defendants hold title; that Moberly, while yet a minor, squandered the money plaintiff paid him for the lease and the deed, and did not have it to restore to plaintiff, but W. B. Linney, as attorney for Moberly, tendered it to plaintiff, but he refused it; that after they purchased from Moberly, Williams and Linney sued this plaintiff in ejectment for the land and recovered it in a judgment rendered in 1895, and after that they sold it to defendant Herbert, and defendants now hold under that title.

The answer then proceeds in the nature of a cross-bill in equity, and states separately three causes calling for equitable relief. The first is leveled at the Martin lease, and charges not only that Moberly was a minor when he made it, but that, in the

matter of obtaining the assignment of the landlord's interest in it from Moberly, the plaintiff, who is a shrewd business man, took advantage of the inexperience of Moberly, plied him with whisky until he was drunk, falsely represented that the lease, which was worth five hundred dollars, was of no value, and by that means obtained the assignment for twenty-five dollars. Then follows a reiteration of the statements in reference to the making of the deed to Williams and Linney by Moberly after he came of age, disaffirmance of the transactions with plaintiff, his squandering of the money received while a minor, the tender of the amount by Williams and Linney, their recovery of the land by suit ⁶¹¹ against plaintiff and sale of the same, under which defendants hold as above stated. The answer concludes with the charge that the lease, being of record, is a cloud on defendants' title, and prays that the cloud be removed and plaintiff enjoined from suing and asserting title under it.

The remaining two paragraphs of the cross-bill are substantial repetitions of the one just summarized, except that one of them is aimed at the second lease and the other at the deed made by Moberly to plaintiff, and praying for their cancellation as clouds on defendants' title, and for injunction against them.

The reply admits the execution of the leases and deed as alleged in the answer, denies all the allegations as to fraud or improper dealing on the part of plaintiff, denies that Moberly was a minor when he executed the same, but avers that if he was a minor he was within a few months of being of age, that plaintiff dealt with him fairly and in good faith, believing him to be of age, he holding himself out as such, and that he and defendants claiming under him are estopped to plead his infancy. Further, that on March 18, 1893, when he was of age, Moberly brought suit against plaintiff seeking to annul the leases and deed on the alleged ground that they were obtained by fraud, and stating in his petition that he was of age when he executed them, which suit resulted in a judgment of dismissal at Moberly's cost; that thereby he ratified and affirmed his act and defendants are estopped to question it.

The court submitted the issues to a jury, who returned a verdict for defendants. After motions for new trial and in arrest were overruled, the cause is here on plaintiff's appeal.

1. Under the pleadings the issues were divisible into two classes, the one constituting an action at law, the other a suit in equity. The issues affecting the validity of the plaintiff's leases and deed on account of the alleged minority of Moberly and his

disaffirmance of the same after coming of age, were ⁶¹² issues in an action at-law triable by a jury; those affecting the validity of the instruments on account of the alleged fraud were issues in an equity suit and for the chancellor to try.

Where an answer in a law suit admits the plaintiff's cause of action and sets up purely an equitable defense, it converts the whole case into a suit in equity triable by the chancellor: *Hodges v. Black*, 8 Mo. App. 389; *Allen v. Logan*, 96 Mo. 591; *McCollum v. Boughton*, 132 Mo. 601. A plaintiff is not thereby deprived of his right of trial by jury because the defendant by his answer concedes the plaintiff's right to recover, unless the equity defense prevails.

But in this case the defendant pleads two affirmative defenses, the one cognizable at law, the other in equity, although he has mingled both in the same paragraphs; but no objection to the answer on that account was made, and, as the facts can be distinguished, we will do so.

If the court had seen fit to try first the issues presented in those portions of the answer which are in the nature of an equitable cross-bill, and had found that the plaintiff's leases and deed were obtained by fraud, the finding would have covered the whole case, and there would have been no propriety in trying the other issues. But if the court had found for the plaintiff on the cross-bill, it would have left the issues relating to Moberly's minority and his disaffirmance or ratification live questions for trial.

It was also in the discretion of the trial court to have singled out the issues at law and have tried them first with the aid of a jury. In that event, if the verdict had been for the plaintiff, the chancellor would have proceeded to try the issues relating to the alleged fraudulent procurement of the instruments, and, if his finding had been for the plaintiff, judgment would have followed the verdict of the jury; if for the defendant, there would have been a decree for him notwithstanding the verdict.

⁶¹³ But all the issues in this case were submitted to the jury, and neither party has a right to complain of that course because both parties tried it in that way and both asked instructions of that kind which were given.

There was a general verdict for defendant which might have been the result of a finding for defendant on one class of issues or the other or on both. If it was on the issues relating to the minority, etc., of Moberly, this court would not be required to balance the evidence to sustain the verdict, but, if it was on the

question of the fraudulent procurement of the instruments, we would have to weigh all the evidence and find the facts.

Appellant omits from his abstract the evidence relating to the age of Moberly at the period in question, because he says he concedes that the evidence on that point was sufficient to support the finding that Moberly was under twenty-one years of age. That leaves open on that branch of the case only the question as to disaffirmance or ratification or estoppel. There was really no evidence entitling the plaintiff to have those questions submitted to the jury.

The evidence shows that in March, 1893, Moberly filed a suit against this plaintiff to set aside the leases and deed on the ground that they had been obtained by fraud, similar to the charge in the answer in this case, which suit was dismissed August 23, 1893, for failure to give security for costs. The evidence of defendant tended to show that it was about the time that suit was dismissed that Moberly discovered that he was a minor when he had the transactions with plaintiff, and then it was that he made the deed to Williams and Linney under which defendants claim.

The only evidence on the part of plaintiff which it is now claimed tends to show a ratification by Moberly after he came of age is by plaintiff himself as follows: "Q. And this conversation you recited in answer to Judge Hill's question, between you and George Moberly after the Moberly suit had ⁶¹⁴ been brought against you; what, if anything, did Moberly say about whether he was satisfied with the transactions between you and him? A. He told me he was satisfied for me to have the place. That I had paid him all I had agreed to, and that it was his wife and attorneys that were suing me; and as for him he considered the land sold and paid for." Witness further said that he was not clear whether this was after the suit had been dismissed or while it was pending; he knew it was after the suit was brought, and that in the conversation no allusion was made to the fact that Moberly was a minor when the transactions were had, nothing said about affirming his act done as a minor; witness up to that time had never heard about Moberly's being a minor when he made the leases and deed. This conversation evidently related to the impeachment of the transactions on the grounds set up in the suit. It could not be taken as a ratification of his act as a minor, unless it appeared that he knew that he was a minor and intended it as a ratification of an act which he might, if he saw fit, disaffirm.

In the face of that evidence, there was the fact of the suit wherein Moberly was seeking to have the instruments annulled on the charge of fraud, which charge the plaintiff in this case escaped, answering only because Moberly could not give security for costs. The appellant's counsel at the trial did not seem to attach any value to the plaintiff's evidence on that point, since he asked no instruction submitting the question of ratification as the act of a minor to the jury; the hypothesis of ratification given in the eighth instruction is on the theory that Moberly was drunk when he executed the instruments. But the learned counsel there took the position that defendants were estopped from asserting that their grantor, Moberly, was a minor because Moberly by his conduct held himself out as a man and thereby misled the plaintiff, and also because in the suit which he filed to set aside the instruments he alleged that he was of age at the time. An instruction ⁶¹⁵ for the plaintiff on each of these points was asked and refused.

The deed of a minor is avoidable at his option under certain equitable restrictions when he comes of age, even though he may have represented himself as of age when he made the deed, and thereby misled the other party to his disadvantage. A minor is no more responsible under the circumstances for his representations than he is for his deed.

Of still less force on the theory of estoppel is his statement in the petition in the suit referred to that he was of age when he executed the instruments. That was after the transactions had occurred, and the plaintiff could not have been misled by it.

When one, on coming of age, seeks to avoid his deed made when he was a minor, he must act promptly, and, if he has the consideration that was paid him for the deed, he must restore it, but, if during his minority the consideration he received has been wasted, he may avoid the deed without making restitution: *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569. In that case this court, per Black, J., said: "The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity; and if he were required to restore an equivalent, where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed."

The evidence showed that this young man went on a spree when he received the money from plaintiff, and in a short while it was all gone. There was also evidence on the part of defendant tending to show that, as soon as it was discovered that Mo-

berly was under age when he had the transactions with plaintiff, a tender of the money that had passed from plaintiff to him was made by one of Moberly's attorneys to plaintiff and refused. That evidence, however, leaves the impression that that tender was made in the interest of Williams and Linney, who were about to become the ⁶¹⁶ purchasers of the land from Moberly, though it was made in Moberly's name. But the plaintiff at the trial seems to have not considered that the evidence justified the submission to the jury of a question as to the invalidity of Moberly's alleged disaffirmance of the transaction because of nonrestitution, since he asked no instruction on that point.

It appears from the evidence that the trustees, under the will of the young man's adopted father, thought he had reached his majority a year earlier than the fact was, and in that mistaken fact invested the money left for him in this land, giving him a life estate and the remainder to the heirs of his body. He was under the same mistaken belief as to his age, and, while so, executed the papers under which the plaintiff claims. But, just about the time the suit he had filed against this plaintiff was dismissed, the mistake was discovered; then it was he made the deed to Williams and Linney under which the defendant now claims. That deed is not set out in full in the appellant's abstract, but it is there described as a warranty deed in due form, dated August 23, 1893, and recorded two days later. From this we infer that it was a deed sufficiently absolute on its face to amount to a disaffirmance of the prior deeds. In such case, the question of disaffirmance is not one of fact for the jury but one of the legal effect of the deed, and is for the court: *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441.

Therefore, under the record before us, it is clear that Moberly was under age when he made the leases and deed under which the plaintiff claims, that he squandered the money he received from plaintiff while he was yet a minor, and disaffirmed the acts as soon after he came of age as he became informed of the facts, and under those conditions the verdict of the jury was right. There was no error in any of the instructions given and none in refusing those refused.

2. Before beginning the trial the plaintiff moved the court to strike out those parts of the defendants' answer that related to the suit brought by Williams and Linney ⁶¹⁷ against the plaintiff and the judgment therein, which motion the court overruled.

As already above intimated, the statements constituting the

ground on which the defendant asked relief in equity were not as clearly separated from those constituting his plea at law as might have been. Those parts of the answer at which the motion to strike out was directed constituted no defense to the action at law, nor did they constitute alone an equitable defense, but they stated a fact which it was proper for the court to consider, with other circumstances, in determining whether or not the plaintiff should be enjoined from further suing. If, as stated in the answer, the title on which the plaintiff now sues was in that suit fully litigated and adjudged to be invalid, and if in this suit it should also be so adjudged, the defendants might, with reason, insist that they be protected by injunction from further unnecessary litigation on that account. Therefore the court did not err in overruling the motion to strike out.

3. On the trial the defendant offered to read the records of the deed from Moberly to William and Linney and the mesne conveyances of the title to defendant. Plaintiff objected, for the reason that it was secondary evidence and the proper foundation had not been laid for its introduction. The court overruled the objection, and the records were read. Then the defendant offered evidence to prove that the instruments were lost or not within his power. But this was objected to, on the ground that it was then immaterial, since the records had already been read, and defendant withdrew the offer.

Under section 2428 of the Revised Statutes of 1889, the record itself was competent if the defendant had satisfied the court that the deeds were lost or that it was not within his power to produce them, but the court erred in allowing the record to be read before defendant had made the proper showing. As, however, it was followed immediately with an offer of the preliminary evidence required, we cannot regard it as an injurious error. ⁶¹⁸ The defendants' offer, the plaintiff's objection and withdrawal in deference to the objection, are to be taken as indicating that defendants would have proven the fact if plaintiff had permitted.

4. As to the alleged fraud on the part of the plaintiff in obtaining the leases and deed from Moberly, the evidence can be compassed within small bounds. The young man was very dissipated and a spendthrift, and his character as such was well known. The plaintiff knew him well, had known him all his life. Plaintiff was forty-one years old, a merchant, and engaged also in buying and selling notes. Moberly, in December, 1891,

shortly after the trustees had bought it for him, leased the farm to Martin for five years from March 1, 1892, for one hundred dollars a year, payable in advance; within a few days after the lease was executed plaintiff bought the first one hundred dollars rent note for fifty-five dollars, and within a few days afterward bought the rest of Moberly's interest in the lease for one hundred and fifty dollars, and obtained a lease from him for a period of five years from the termination of the first lease at a total rental of fifty dollars cash and a promise to pay taxes; then again in a few days a deed to all Moberly's interest in the land, that is his life estate, for fifty dollars. The land was worth about two thousand dollars—that is the fee.

The evidence does not show that plaintiff gave the young man intoxicating drinks, nor does it affirmatively appear that the youth was drunk when he signed the papers. But the plaintiff knew the young man's misfortune, knew how his adopted father and the trustees under the will had tried to provide for him against his own improvidence; and the plaintiff ought not to have had those transactions with him. For a total of two hundred and fifty dollars the plaintiff essayed to become the owner of all this unfortunate youth's estate, knowing as well beforehand how the money would be spent as did afterward the somewhat flippant witness who stayed with him until he spent it all. The law does not justify that kind of dealing and courts of equity will set aside deeds obtained in that way.

619 5. The judgment that was first entered was simply responsive to the verdict of the jury to the effect that the plaintiff take nothing by his writ and the defendant go hence and recover his costs. But, on overruling the motion for a new trial, the court added to the judgment that the plaintiff be enjoined from further prosecuting a suit under the same title. It was not only irregular to enter judgment in that broken form, but the defendant was not entitled to such an injunction. This is the first suit the plaintiff has brought on that title, and we have no right to presume that he is going to continue to sue.

The defendants, however, were entitled, in addition to the ordinary judgment following the verdict, to a cancellation of the assignment by Moberly to plaintiff and J. D. Ridgeway of the Martin lease, and a decree that the second lease and the deed from Moberly to plaintiff on the records of Grundy county were clouds on defendants' title and canceling the same.

6. In accordance with the foregoing views, the judgment of the circuit court is reversed and the cause remanded, with directions to that court to enter judgment for defendants according to the verdict of the jury on the plaintiff's cause of action, and canceling the assignment of the Martin lease to plaintiff and J. D. Ridgeway, decreeing the lease of date February 1, 1892, and the deed of date February 4, 1892, from Moberly to plaintiff clouds on defendants' title and canceling the same, and adjudging that defendants recover of plaintiff the costs incurred in the circuit court.

Brace, P. J., and Robinson, J., concur.

Marshall, J., concurs in result, but dissents from the doctrine quoted from *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569.

DEEDS OF MINORS—DISAFFIRMANCE BY CONVEYANCE. Where a minor executes a deed of conveyance, and, after attaining majority, conveys the same land to a third person, the second deed is a disaffirmance of the first: *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, and note.

DEEDS OF MINORS—DISAFFIRMANCE OF—RETURN OF CONSIDERATION.—If an infant retains the consideration for a conveyance made by him, equity may require its return as a condition to setting aside such conveyance; but if he has wasted or in any way parted with the consideration, his obligation to return it is at an end: *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, and note.

DEEDS BY MINORS—DISAFFIRMANCE—MISREPRESENTATIONS.—A grantor is not estopped to disaffirm her deed on the ground of infancy, and maintain an action to recover the land, by a false representation that she was of age: *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676. For a further discussion of this question, consult the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 633-637.

DEEDS OF MINORS—DISAFFIRMANCE OF DISAFFIRMANCE.—A disaffirmance once made by an infant, though during his minority, should be held binding upon him. But there is authority to the contrary: Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 694, 695.

DEEDS OF MINORS—DISAFFIRMANCE.—Whether a deed made after majority constitutes a disaffirmance of a prior deed executed by the grantor while an infant is a question of law for the court: *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441.

PRACTICE.—AN EQUITABLE DEFENSE may be made in an action at law, and, in such a case, a jury substituted in the place of the chancellor: *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298.

WONDERLY v. LAFAYETTE COUNTY.

[150 MISSOURI, 685.]

JUDGMENTS—ACTION ON—EVIDENCE.—If, in an action on a judgment, the answer admits the rendition of the judgment, it is not necessary for plaintiff to introduce a transcript of the judgment in evidence.

JUDGMENTS—ASSIGNMENT—EVIDENCE.—The noting of an assignment of a judgment on the margin of the record in a federal court is not competent evidence to prove the assignment in a state court. Nor can such assignment be proved by a certificate of acknowledgment taken before a clerk of a federal court in another state.

JUDGMENTS OF FEDERAL COURTS—PLEADING JURISDICTION.—In a suit in a state court praying for judgment upon a judgment of a federal circuit court, it is not necessary to set out facts to show that such federal court had jurisdiction, nor can such suit be defeated on a plea at law that it did not have jurisdiction.

JUDGMENTS OF FEDERAL COURTS—COLLATERAL ATTACK—FRAUD.—A judgment of a federal circuit court is not subject to collateral attack in a state court, but it may there be attacked by a direct proceeding in equity on the ground that it was procured through fraud.

JUDGMENTS—FRAUD AS AFFECTING.—A judgment is vitiated by the fraud of the plaintiff, whereby the defendant was prevented from making his defense, which rests in the peculiar knowledge of the plaintiff, who conceals it from the defendant.

JUDGMENTS—FRAUD IN OBTAINING.—A false pretense that the nominal plaintiff in a federal court is the owner of bonds sued on, when made to give jurisdiction to that court on the ground of diverse citizenship of the parties, while the real plaintiff and defendant are citizens of the same state, constitutes a fraud which will render such judgment subject to attack in a state court of equity, if the real defendant is thereby deceived and prevented from making his defense.

JUDGMENTS—SETTING ASIDE FOR FRAUD.—A state court of equity has jurisdiction to entertain a bill to set aside a judgment obtained by fraud in a federal court.

W. Aull, J. M. Lewis, and E. Robinson, for the appellant.

F. A. Wind, for the respondent.

640 VALLIANT, J. This is a suit begun the 18th of September, 1895, in the circuit court of Lafayette county upon a judgment rendered the 31st of October, 1885, in the circuit court of the United States for the western division of the western district of Missouri in favor of one Francis D. Owings against Lafayette county for eleven thousand seven hundred and ninety-one dollars and forty-five cents, and alleged to have been **641** assigned to the plaintiff Wonderly. The petition alleges the issuance and service on defendant of the summons, the return of same, and rendition of judgment and assignment there-

of to plaintiff; that the cause of action on which it was found consisted of bonds and coupons bearing interest at ten per cent per annum from maturity. The petition did not state facts showing that the suit in which the judgment was rendered was within the jurisdiction of the federal court, nor did it state that the judgment had not been paid.

Defendant, by its amended answer, admitted the rendition of the judgment and denied the assignment. Then the answer proceeded affirmatively to state a case for equitable cognizance, charging that the judgment was procured by fraud, and praying that it be set aside and annulled. In substance, the charge of fraud was that the bonds and coupons on which the judgment was founded were issued under a certain act of the general assembly of Missouri named, which was in conflict with the constitution of the state, and was therefore invalid, and the bonds and coupons were null and void. That under the laws then existing the circuit courts of the United States within this state had jurisdiction of suits involving more than two thousand dollars, wherein a citizen of another state was plaintiff and a citizen of this state defendant. That prior to the institution of the suit in which the judgment sued on was rendered, the supreme court of this state had in numerous decisions adjudged the act of the legislature mentioned unconstitutional and void, and bonds purporting to be issued thereunder of no force and effect; but that the courts of the United States had taken a contrary view, and had decided that the act was constitutional and valid, and bonds issued under it binding obligations. That prior to the institution of that suit the plaintiff in this suit was fully advised of the decisions of the supreme court of this state, and also of those of the United States courts on that subject, and he knew that if he sued on those bonds and coupons in a court of this state the result ⁶⁴² would be a judgment for defendant, but if he sued in the federal court the probability was that the bonds would be held valid and he would obtain a judgment on them. That at the time that suit was instituted in the name of Owings he was not the owner of the bonds or coupons, but the same were the property of the plaintiff in this case, and he and Owings both knowing how the Missouri courts had held, and also how the federal courts had held, "combined and conspired together for the purpose of wronging, cheating, and defrauding this defendant, and of imposing and perpetrating a fraud upon the jurisdiction of the United States circuit court within and for the western division of the western district of

the state of Missouri, and in pursuance of such combination and conspiracy, the said plaintiff and the said Owings falsely and fraudulently pretended the said plaintiff had sold and assigned and transferred to said Owings the aforesaid bonds, and thereupon the said Owings, pretending to be the holder and owner of said bonds, instituted said suit in said United States court." That all the time the plaintiff was and still is a citizen of Missouri and Owings was and still is a citizen of Illinois; that the pretended transfer to Owings was to enable the plaintiff in that name to use the United States court, to obtain a judgment which he knew he could not obtain in his own name. That defendant had no knowledge or information as to the real ownership of the bonds or of the facts in regard to the pretended assignment until November, 1895. That if defendant had had any knowledge or information of the fraud it would have made the defense in that court, but that the plaintiff and Owings, knowing that the defendant was ignorant of the real ownership and pretended transfer kept the facts secret, and defendant was thus prevented from raising the question of jurisdiction in that court. That defendant had no information or intimation of the real ownership of the bonds and the fraud that had been practiced until after the institution of the ⁶⁴³ present suit. There is a prayer asking that the judgment be set aside, etc.

Defendant then proceeds by way of a cross-bill to state the rendition of the same judgment and that in October, 1895, a writ of scire facias to revive the judgment had issued out of the United States court in the name of Owings to the use of plaintiff against defendant; then the same facts to show that the judgment was obtained by fraud as above stated are pleaded again, and the cross-bill concludes with a prayer for an injunction to restrain the plaintiff from further prosecuting the writ until the final determination of this suit.

On motion of the plaintiff, the court struck out all of defendant's answer except the first clause, which admitted the rendition of the judgment and denied the assignment, to which the defendant duly excepted. The cause was tried by the court without a jury.

On the trial, the plaintiff introduced in evidence a document marked "Transcript of Judgments," which purports to set out a copy of the petition, summons, and return showing service on defendant and the judgment in question, and a certificate purporting to be signed by the clerk, to the effect that on September 12, 1891, there was presented an assignment of the judg-

ment "duly acknowledged to Charles P. Wonderly of St. Louis, Mo., dated Nov. 28, 1885." To the whole document there is the attestation of the clerk duly certified by the judge, that it is a "true copy of the judgment record in the above-entitled cause." Defendant objected, on the ground that the certificate of the clerk was not sufficient. The objection was overruled, and defendant excepted. Then plaintiff offered what purported to be an assignment of the judgment dated the 28th of November, 1885, signed by Francis P. Owings, acknowledged before one William H. Bradley, as clerk of the circuit court of the United States for the northern district of Illinois. The defendant objected, on the ground that the judgment was in the name of Francis D. Owings and the purported ⁶⁴⁴ assignment was in the name of Francis P. Owings, and also on the ground that the purported certificate of acknowledgment was not evidence. Objections overruled and exceptions taken. Then there was a certificate of the clerk of the court in which the judgment was rendered, to the effect that he had noted the assignment on the margin of the entry of the judgment the 12th of September, 1891. This was objected to as incompetent; objection overruled, and exception taken. That was all the evidence for plaintiff. Defendant offered evidence tending to prove the facts alleged in that portion of the answer which had been stricken out, but, on objection of plaintiff, it was excluded, and defendant excepted. The court found for plaintiff and rendered judgment in his favor for twenty-three thousand nine hundred and twenty-eight dollars and sixty-three cents. Motions for new trial and in arrest followed, which were overruled, and the cause is here on defendant's appeal.

1. The answer of defendant admits the rendition of the judgment as alleged in the petition. Therefore, there was no necessity for plaintiff to introduce in evidence what purported to be a transcript of the judgment, and, if there was any error in admitting it, it was immaterial.

The answer, however, does deny the alleged assignment, and the burden of proving that devolved on the plaintiff. The proof offered was a paper purporting to be signed by one Francis P. Owings and attested by and acknowledged before one William H. Bradley, as clerk of the circuit court of the United States for the northern district of Illinois, and a certificate of the clerk of the court in which the judgment was rendered that he had noted that assignment on the margin of the entry of the judgment. The noting of the assignment on the margin of the

judgment entry was, for the purposes of this case, immaterial. The material question related to the fact of assignment. The only evidence on that point was a paper purporting to have been acknowledged before a clerk in Illinois. The acknowledgment was in the form prescribed for proof of a deed to land to be recorded, but the statute on the subject of ⁶⁴⁵ acknowledgment of deeds, etc., does not provide for the acknowledgment of an assignment of a judgment, and the certificate was not evidence for that purpose. Section 6043 directing how judgments may be assigned, and the assignments entered on the judgment record, relate only to judgments of the courts of this state. The general assembly has no control over the records of a federal court, and, although it might lay down as a law of evidence for use in a state court a rule for the proof of the assignment of judgments of a federal court, in the form that is here offered, yet it has not done so. This alleged assignment purporting to have been made in Illinois, although it relates to a record of a court of the United States, yet is in no sense a judicial proceeding within the meaning of section 4881 of the Revised Statutes of 1889, and therefore not a subject of proof by clerk's certificate.

In plaintiff's addition to the abstract of the record it is stated that there was other proof of the assignment besides that certificate. That does not cure the error. The other evidence may or may not have been satisfactory to the trier of the fact. The attestation of the clerk and the certificate of acknowledgment were not legal evidence of the alleged assignment, and the defendant's objection to it should have been sustained.

2. But the serious question in this case relates to the action of the court in striking out of defendant's answer its equitable affirmative defense. That clause in the answer was shaped to all intents and purposes as a regular bill in equity, in the form of a direct proceeding, making an attack on the judgment upon the ground that it was obtained by fraud, specifying the acts which it is charged constitute the fraud, and praying the relief of cancellation and annulment of the judgment. And it is evident from reading the answer that the pleader had in his mind to charge that the fraud complained of was in the procurement of the judgment as distinguished from fraud in the cause of action. The ground of equity jurisdiction in such case is clearly marked out in recent decisions of ⁶⁴⁶ this court: *Hamilton v. McLean*, 139 Mo. 678; *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407.

The very able briefs of the counsel in this case discuss the questions of law involved and review the authorities with so much learning and industry that our labors are greatly lightened.

In reading a court's decision, it is always important to understand the facts of the particular case in order to obtain a correct view of the law declared in the opinion. The observance of that precaution is particularly needed in reading the authorities encountered in the search for the law of this case, because one is constantly running across decisions treating of indirect or collateral attacks on judgments, and of judgments of courts of peculiar or limited jurisdiction, and of charges of fraud relating to the cause of action on which the judgment is founded.

There are several propositions contended for by the counsel for the plaintiff which, for the purposes of this case, may be conceded without discussion, viz: In a suit upon a judgment of a circuit court of the United States, it is not necessary to set out in the petition facts to show that that court had jurisdiction. Nor can such a suit be defeated on a plea at law that the facts required to confer the jurisdiction did not exist. The judgment of that court is not subject to attack in that way. If the facts conferring jurisdiction do not appear on the face of the whole record, the judgment may be reversed on appeal or writ of error, but the proceedings cannot be treated as *coram non judice*, as would be the case if it were a court not only of limited but also of inferior jurisdiction. The circuit courts of the United States are of limited but not inferior jurisdiction: *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 552. The judgments of such courts are entitled to equal rank and presumption of regularity as are judgments of the circuit courts of this state: *Reed v. Vaughan*, 15 Mo. 141, 55 Am. Dec. 133.

647 The jurisdictional facts in a suit in a federal court, although they may be independent of the facts constituting the cause of action, are yet facts to be pleaded, and, if denied, proven, but, when the judgment is rendered, the presumption goes with it that the court tried all the issues that were raised, and found all the facts necessary on which to found the judgment, and that judgment does not depend for its validity upon the ability of the plaintiff therein to be always ready to verify his statements as to the jurisdictional facts.

All of these propositions, summed up, mean that such a judgment is not subject to a collateral attack; and no one is here

contending that it is. But the judgment of a circuit court of the United States, like that of a circuit court of the state, may be attacked in a direct proceeding in equity upon the ground that it was concocted and procured by fraud; and no one is here disputing that proposition.

The attack made on the judgment in this answer is not collateral, but a direct proceeding in equity to annul the judgment; the plaintiff's motion to strike out confesses the facts and the only question therefore is, Do the facts stated make out a case of a judgment concocted and procured by fraud?

Taking these statements to be true, the plaintiff was the owner of these county or township bonds; he knew that this court had in numerous cases decided that the act of the legislature under which they were issued was in violation of the constitution of the state, and the bonds were invalid; he knew that the United States courts had held that the act was constitutional and the bonds valid; he knew that he could not get a judgment on his bonds in any court in the state; he knew that if he could sue in the federal court he could get a judgment, but, being a citizen of Missouri, he knew he had no right to sue a county of Missouri in a federal court; then, to obtain under false pretense what he could not obtain by truth, he impersonated a citizen of Illinois and under that disguise went into the federal court and obtained his judgment; he did not ⁶⁴⁸ go in with his own face or his own name, but equity, which looks at the substance and not at the shadow, which regards the real and not the sham, looks through the mask and recognizes the plaintiff in this suit as the real plaintiff in that suit. The scheme was a fraud on the court whose jurisdiction was betrayed and a fraud on the defendant who was tricked out of its defense.

True, the statement in the petition in that suit that Owings, a citizen of Illinois, was the owner of the bonds, is a statement which, under fair conditions, might have been traversed, and the plaintiff put to his proof. But there were no such fair conditions there. The fact that that statement was false was known only to the plaintiff and Owings, and they concealed it for the purpose of preventing defendant from making that defense. Not only was the true ownership of the bonds known to them, but the false appearance of ownership was a fact of their own creation, concocted for the purpose of deceiving the court into entertaining a case which, if the truth appeared, it would have rejected on the ground that it had no jurisdiction: 18 U. S. Stats. at Large, c. 137, p. 472; Williams v. Nottawa, 104 U. S.

209; *Farmington v. Pillsbury*, 114 U. S. 138; *Hartog v. Memory*, 116 U. S. 588; *Morris v. Gilmer*, 129 U. S. 324.

Cases are cited to support the contention that a sale made to a nonresident for the purpose of enabling the grantee to sue in a federal court is not a fraud within the meaning of the federal judiciary act; but those cases, if they bear out the contention, do not help the plaintiff in this suit, because, according to the averment in the answer, there was no sale of the bonds to Owings. They were the property of Wonderly, while they were in suit under the false pretense that they were the property of Owings: *Barney v. Baltimore*, 6 Wall. 280.

Farmington v. Pillsbury, 114 U. S. 138, was a case where municipal bonds of a village in Maine had been issued under an act of the legislature which the supreme court of that state had ⁶⁴⁰ declared to be unconstitutional, and the bonds invalid; the holder of some of them made a collusive transfer to a citizen of Massachusetts for the purpose of suing on them in a United States court. The supreme court of the United States in that case, per White, Chief Justice, said (*Farmington v. Pillsbury*, 114 U. S. 143): "And upon the question of transfer it was uniformly held that, if the transaction was real and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted, it was a matter of no importance that the assignee or grantee could sue in the courts of the United States when his assignor or grantor could not. . . . But it was equally well settled that, if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff on record but a nominal or colorable party, his name being used only for the purpose of jurisdiction, the suit would be essentially a controversy between the assignor or grantor and the defendant, notwithstanding the formal assignment or conveyance, and that the jurisdiction of the court would be determined by their citizenship, rather than that of the nominal plaintiff. . . . Such was the condition of the law when the act of 1875 was passed, which allowed suits to be brought by the assignees of promissory notes negotiable by the law-merchant, as well as of foreign and domestic bills of exchange, if the necessary citizenship of the parties existed. This opened wide the door for frauds upon the jurisdiction of the court by collusive transfers, so as to make colorable parties and create cases cognizable by the courts of the United States. To protect the courts, as well as parties, against such frauds upon their jurisdiction, it was made the duty of a

court, at any time when it satisfactorily appeared that a suit did not 'really and substantially involve a dispute or controversy' properly within its jurisdiction, or that the parties 'had been improperly or collusively made or joined for the purpose of creating a case cognizable under the act,' to proceed no further therein. . . . This, as was said in *Williams v. Nottawa*, ⁶⁵⁰ 104 U. S. 209, 211, 'imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered.' "

We have thus quoted at length the language of the supreme court of the United States to show that that court denounces the conduct of the parties in such transactions as a fraud on the courts, as well as on the defendants. The same unvarnished terms are used in the other cases above cited.

The reason of the doctrine that equity will not entertain a bill to set aside a judgment merely on the averment that the cause of action on which it is founded is tainted with fraud is, that the party had an opportunity to interpose that defense in the suit in which the judgment was rendered: *Irvine v. Leyh*, 102 Mo. 200, 207. But when the defendant is prevented by the fraud of the plaintiff from making the defense, and when, as in this case, the defense rests in the peculiar knowledge of the plaintiff, and he conceals it from defendant, the fraud attaches to the judgment itself and vitiates it. It is a fraud in procuring the judgment: *Black on Judgments*, sec. 371; *Freeman on Judgments*, sec. 491; *Fish v. Lane*, 2 Hayw. 342; *Reed v. Harvey*, 23 Ark. 44; *Spencer v. Vigneaux*, 20 Cal. 442; *Ocean Ins. Co. v. Fields*, 2 Story, 59.

In the case last cited, the decision was by Judge Story, where-in he says: "Now, the very reason upon which the present bill is founded is, that this, a perfect and valid defense at law, was, by the fraudulent concealment of the defendant and the total ignorance of the plaintiffs in the facts, incapable of being set up to the original action; and the recovery was, therefore, inequitable and iniquitous. It would be against all the principles of a court of equity to allow one party to practice a fraud upon another party, and by another act of fraudulent concealment recover a judgment against him founded upon the prior act; and then to be permitted to assert this ⁶⁵¹ double iniquity as a bar to all equitable relief against the judgment."

Even if the suit in which the judgment now in question was rendered had been in a state court, it would have been necessary

for the nominal plaintiff, Owings, to have averred in his petition that he was the owner of the bonds, because that was a fact essential to his cause of action; but that averment in that case in the federal court had a double significance, the one bearing on the plaintiff's right of action, the other on the right of the owner of the bonds to sue in that court; in the one sense, it was a fraud on the defendant alone; in the other, it was a fraud on both the court and the defendant. The law which required the owner of the bonds to be a citizen of another state in order to give the federal court jurisdiction was a law of that court, and the plaintiff's act of masking as Owings, and thus gaining entrance which with his own face he could not have gained, was a fraud in law. And since by that means he evaded the law of this state applicable to his cause of action, as pronounced by this court, his judgment is to be deemed as in fraud of the law of this state, and not entitled to the protection of its court: Freeman on Judgments, sec. 566; Dunlap v. Cody, 31 Iowa, 260, 7 Am. Rep. 129; Durringer v. Moschino, 93 Ind. 495.

In the Iowa case just above cited, the plaintiff's cause of action was barred by the statute of limitations in Iowa, where the defendant resided, and the plaintiff to evade that defense, by a fraudulent scheme, induced defendant to go to Illinois, where the claim was not barred, and there served process on him and obtained judgment. In a suit on the judgment in Iowa, the supreme court of that state by Day, C. J., said: "Counsel representing plaintiff in this court, and who, it is but just to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position that the mode of obtaining jurisdiction was fraudulent. They concede that it 'smells somewhat of fraud.' The only palliation which they are able to offer is the suggestion of a doubt whether it may ⁶⁵² not be considered a pious fraud in which the end justifies the means. We do not think that it is entitled even to that small measure of charity. An enlightened and just administration of the law, no less than some public morals, condemns such practices, and demands that the client whose cupidity could sanction, and the attorney whose venality could execute, such a purpose, should alike be disgraced."

We quote the words of these high courts and distinguished jurists to show in what estimation they hold the conduct of those who, by cunning, would pervert the administration of justice.

There is no difference in principle between the fraudulent concoction of a scheme that brings the defendant within the jurisdiction of a court of a foreign state, and the fraudulent concoction of a scheme that brings him within the jurisdiction of a federal court which otherwise would not have had jurisdiction over him.

In whatever aspect we view it, we cannot fail to see that the judgment in question was obtained by a fraudulent abuse of the court which rendered it, and a fraudulent scheme by which the defendant was tricked out of the defense it had a right to make, and could have made in the only forum in which the real plaintiff could have sued.

The point is advanced in plaintiff's brief that a judgment can be annulled on the ground that it was obtained by fraud only in the court in which it was rendered. But there is no foundation in reason or authority for that proposition, and the contrary has been declared in *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432; *Payne v. O'Shea*, 84 Mo. 129; *Doughty v. Doughty*, 27 N. J. Eq. 315; *Pomeroy's Equity Jurisprudence*, 2d ed., sec. 919.

A suit to set aside a judgment is a suit in equity, and it was necessarily in another court than that in which the judgment was rendered when courts of law and courts of chancery were separate, and when the judgment attacked was a law judgment. In the case at bar, if the defendant could have no ⁶⁵³ relief in a state court, it could have none at all. If the suit at bar had been brought in the United States circuit court, the defendant could not have pleaded the equitable defense it has pleaded here, because, under the practice in that court, only legal defenses can be pleaded to legal actions. The defendant would have been compelled to have filed a separate suit in equity under that practice to obtain the relief it seeks. But, being a citizen of this state, it could not have maintained such a suit there, because the doors of that court are not open to this defendant. Hence, if the plaintiff's contention is correct, a citizen of Missouri, against whom a judgment should be obtained by fraud in a United States court, would be absolutely without remedy.

A suit in equity to set aside a judgment in no sense assails the court in which the judgment was rendered. It is simply a proceeding in personam, and the decree adjudges the rights of the parties inter sese in relation to that judgment: *Story's Equity Jurisprudence*, sec. 875; *Black on Judgments*, sec. 919; *Pearce v. Olney*, 20 Conn. 544; *Marshall v. Holmes*, 141 U. S. 589.

A judgment of a United States circuit court sitting in this state is to be accorded such effect, and such effect only, as a judgment of a circuit court of this state: *Black on Judgments*, sec. 938; *Crescent Live Stock Co. v. Butcher's Union Co.*, 120 U. S. 141.

The federal circuit courts have never claimed for themselves higher authority than the highest courts of original jurisdiction of the state in which they sit, and the lofty spirit in which those courts administer justice repels the idea that they would claim that a judgment of theirs, procured by fraud and abuse of their jurisdiction, should be held exempt from a direct attack in the only forum in which the injured party could obtain relief.

There are decisions to the effect that a state court will not interfere with the due course of a writ issuing out of a federal court or a trial there, and in like manner, and for the ⁶⁵⁴ same reason, a federal court would not interfere with the process of a state court or with a trial there. But the principle on which these decisions are founded has nothing to do with a proceeding in equity to set aside a judgment on the ground that it was obtained by fraud. In such case a federal court of equity will entertain a bill to set aside a judgment obtained in a state court, and a state court of equity will entertain a bill to set aside a judgment obtained in a federal court. The distinction here made is pointed out by the supreme court of the United States in *Marshall v. Holmes*, 141 U. S. 589.

The circuit courts of this state are courts of general jurisdiction, and there is no subject of litigation between citizens of this state, beyond their jurisdiction, except such subjects as are by our law conferred on other courts of limited jurisdiction.

When a suit on a judgment is brought in a circuit court in this state, the defendant may, under our Code of Civil Procedure, plead as an equitable defense facts showing that the judgment was procured by fraud: *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432; *Ward v. Quinlivan*, 57 Mo. 425.

Plaintiff in his brief insists that the defendant has not shown due diligence in discovering the fraud. The answer avers that the fraud was known only to plaintiff and Owings, and by them concealed so that defendant did not discover it until after the institution of this suit. There could be no laches on the part of defendant under those circumstances.

The facts pleaded in that portion of the answer now under discussion constitute a complete equitable defense to the suit,

and, if sustained on the trial, the defendant will be entitled to a decree annulling the judgment on the ground that it was procured by fraud, and perpetually enjoining the plaintiff from proceeding or attempting in any manner to enforce it or make any use of it whatever. The circuit court erred in striking out that part of the answer.

3. There was another paragraph of defendant's answer also stricken out which contained a statement of the same facts ⁶⁵⁵ and the additional fact that the plaintiff had sued out of the United States court a scire facias to revive the judgment, and prayed an injunction to restrain the plaintiff from prosecuting that writ.

It will not be necessary for us now to decide whether or not the action of the court in striking out that paragraph was right, because its sole object was to obtain an injunction against the prosecution of the scire facias, which injunction was denied, and that writ has doubtless taken its course and its force is spent.

The suing out of that writ serves to illustrate what has been said above on the point of the jurisdiction of the state circuit court to adjust the rights of the parties according to the equities pleaded in the answer. The defendant in that writ, whatever its equities, was entirely defenseless. That court could hear nothing in answer to that writ, except that the judgment had been paid; no equitable defense could be pleaded, and the defendant, being a citizen of Missouri, could bring no independent suit in equity in that tribunal. It would be a very imperfect system of jurisprudence if the courts of the state which alone have jurisdiction of both parties were powerless to enforce justice between them.

The judgment of the circuit court is reversed and the cause remanded, to be retried according to the law as herein expressed.

All concur.

JUDGMENTS OF FEDERAL COURTS—EFFECT TO BE GIVEN THEM.—Courts of the United States within a particular state are not regarded in that state as foreign courts. Their judgments in all respects as to remedies are treated as domestic judgments: *First Nat. Bank of Chicago v. Sloman*, 42 Neb. 350, 47 Am. St. Rep. 707. State courts must give the same force and effect to a final judgment of the circuit court of the United States that they give to the judgments of the courts of their own state: *Oceanic etc. Co. v. Compania etc.*, 134 N. Y. 461, 30 Am. St. Rep. 685.

JUDGMENTS OF FEDERAL COURTS—COLLATERAL ATTACK.—Judgments of the United States courts cannot be impeached in state courts for irregularities or error in a collateral proceeding; they can be vacated only in the courts in which they were rendered, or reversed for error in an appellate jurisdiction: *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133. Compare *Lowry v. Erwin*, 6 Rob. 192, 39 Am. Dec. 556; *Vose v. Morton*, 4 Cush. 27, 50 Am. Dec. 750; *Steinbach v. Relief etc. Ins. Co.*, 77 N. Y. 498, 33 Am. Rep. 655.

JUDGMENTS OF FEDERAL COURTS—PLEADING OF.—In pleading a judgment or decree of a federal court, it is not necessary to show the facts giving such court jurisdiction: *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133.

JUDGMENTS OF FEDERAL COURTS—JURISDICTION.—A judgment of a United States circuit court on a note not actually transferred to the nominal plaintiff before suit, where the original parties to the note are citizens of the state, though the nominal plaintiff is a citizen of another state, is void for want of jurisdiction, and evidence is admissible to show that the note was not so transferred, in an action by a purchaser of land under the judgment against a prior grantee under an unrecorded deed, who was no party or privy to the judgment: *Vose v. Morton*, 4 Cush. 27, 50 Am. Dec. 750.

JUDGMENTS—HOW VACATED FOR FRAUD.—When a party is prevented by fraud from interposing a defense before judgment is rendered, he may apply to that court for its annulment and to be let in to defend on the merits: *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202. A person against whom a judgment has been obtained by fraud must seek relief in the court which rendered the judgment: *Smithson v. Smithson*, 37 Neb. 535, 40 Am. St. Rep. 504.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

DEWEESE v. MUFF.

[57 NEBRASKA, 17.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—PAYMENT TO AGENT.—If a note indorsed in blank by the payee is delivered to an agent for collection, payment thereof by the maker to such agent while the note is in his possession, after the death of the payee and without notice thereof, discharges the debt.

T. Ryan and J. W. Dawes, for the plaintiff in error.

F. I. Foss and W. R. Matson, for the defendant in error.

19 NORVAL, J. On July 1, 1892, Catherine Muff executed a note whereby she promised to pay to the order of James E. Jones the sum of two thousand dollars on September 1st of the same year, with interest thereon at seven per cent per annum. The payee resided in England, but the note was delivered to him personally at Crete, Nebraska; at which time he stated, in substance, to Mrs. Muff, in the presence of one J. H. Gruben, her business manager, that he would probably sell the note to C. C. Burr of Lincoln, as he, Jones, was going to England and desired to take the money with him, and that the maker should pay the note to Mr. Burr. The latter had been and then was the agent of Mr. Jones. Instead of selling the note, the payee, soon after it was given, indorsed the same in blank and delivered the instrument to Mr. Burr for collection. On September 19, 1892, Mrs. Muff paid one thousand dollars on the note to Mr. Burr, and on November 11, 1892, she paid him the balance due, and the instrument was at the time de-

livered to her indorsed, "Paid Nov. 11th, '92. C. C. Burr." On October 16, 1892, James E. Jones died, leaving a will, and Jacob Bigler was duly appointed executor of his estate, and qualified as such. The executor repudiates the payment made to Mr. Burr on November 11th, claiming that the latter's authority to collect the note had been previously revoked by the death of Mr. Jones, and this action was brought to recover from Mrs. Muff the amount of said payment as the balance alleged to be due on the note. The jury returned a verdict for the defendant, under a peremptory instruction of the court so to do, and error has been prosecuted from the judgment entered thereon. After the filing of the record in this court Jacob Bigler died, and the action was revived in the name of Jasper C. Deweese, ²⁰ as executor de bonis non of the estate of James E. Jones, deceased.

It is disclosed that Mrs. Muff paid the amount due on the note to Burr in good faith, without any notice or knowledge whatsoever that he was not the owner of the paper, or that Mr. Jones, the payee, was dead. It is insisted that the court erred in directing a verdict for the defendant, because the death of Jones revoked the authority or power of Mr. Burr to receive from the maker payment of the obligation, although she was unaware of the death of the payee. Undoubtedly, the rule is that the death of a principal instantly terminates the agency; but it by no means follows that all dealings with the agent thereafter are absolutely void. Where in good faith one deals with an agent within his apparent authority, in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act to be done is not required to be performed in the name of the principal. There is a sharp conflict in the authorities on the question, but it is believed that the better reasoned cases sustain the proposition stated, among which are the following: *Ish v. Crane*, 8 Ohio St. 520, 13 Ohio St. 574; *Cassiday v. M'Kenzie*, 4 Watts & S. 282, 39 Am. Dec. 76; *Davis v. Lane*, 10 N. H. 156; *Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267; *Moore v. Hall*, 48 Mich. 143; 1 Am. & Eng. Ency. of Law, 2d ed., 1224.

We quote the following apposite language from the opinion in *Ish v. Crane*, 8 Ohio St. 520: "Now, upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of

confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of actual ²¹ revocation, is still to be regarded as continuing, in such cases as the present, toward third persons, until actual or implied notice of the revocation. And I admit that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law. It seems to me that in all such cases the party who has, by his own conduct, purposely invited confidence and credit to be reposed in another as his agent, and has thereby induced another to deal with him in good faith, as such agent, neither such party nor his representatives ought to be permitted, in law, to gainsay the commission of credit and confidence so given to him by the principal. And I think the authorities go to that extent: See *Pickard v. Sears*, 6 Ad. & E. 69. The extensive relations of commerce are often remote as well as intimate. The application of this doctrine must include factors, foreign as well as domestic, commission merchants, consignees and supercargoes, and other agents remote from their principal, and who are required for long periods of time not infrequently, by their principal, to transact business of immense importance, without a possibility of knowing perhaps even the probable continuance of the life of the principal. It must not infrequently happen that valuable cargoes are sold and purchased in foreign countries by the agent, in obedience to his instructions from his principal, after and without knowledge of his death. And so, too, cases are constantly occurring of money being collected and paid by agents, under instructions of the principal, after and without knowledge of his death. In all these cases there is certainly every reason for holding valid and binding the acts so done by the agency which the principal had, in his life, constituted and ordered, that there would be to hold valid the acts of one who had ceased to be his agent, by revocation of his power, but without notice to the one trusting him as agent."

In the case at bar it was not necessary for the agent, Mr. Burr, to collect, or receive the money in the name of ²² Mr. Jones, nor did he do so. The defendant was justified in paying the money under the circumstances disclosed by the evidence. The note was properly indorsed by the payee in blank, and it was at the time in possession of Mr. Burr. Payment to him

without knowledge that the note was held for collection, or that the owner was dead, discharged the debt: *Davis v. Lusitanian Portuguese Ben. Assn.*, 20 La. Ann. 24; 18 Am. & Eng. Ency. of Law, 190; *Edwards v. Parks*, 60 N. C. 598; *Loomis v. Downs*, 26 Ill. App. 257; *Stoddard v. Burton*, 41 Iowa, 582; *Boyd v. Corbitt*, 37 Mich. 52; *Moore v. Hall*, 48 Mich. 143. In the case last cited a negotiable note was indorsed by the payee and delivered to an agent for collection. Subsequently the payee died. It was held that the authority to collect was not thereby revoked. A verdict for the defendant was properly directed in the case at bar. The conclusion reached obviates an examination of the instructions tendered by the plaintiff and refused by the court. The judgment is affirmed.

Ryan, C., not sitting.

AGENCY.—PAYMENT TO THE AGENT AFTER THE DEATH of the principal, the parties being ignorant of the death, is good: *Cassiday v. McKenzie*, 4 Watts & S. 282, 39 Am. Dec. 76, and see note thereto, 81-91. Compare *Farmers' Loan etc. Co. v. Wilson*, 139 N. Y. 284, 36 Am. St. Rep. 696.

RICKETTS v. SCOTHORN.

[57 NEBRASKA, 51.]

NEGOTIABLE INSTRUMENTS—GRATUITY—CONSIDERATION.—A note given to the payee as a mere gratuity is nothing more than a promise to make a gift in the future, and, in the absence of special circumstances, cannot be enforced.

NEGOTIABLE INSTRUMENTS—CONSIDERATION—ESTOPPEL.—A note given to the payee to enable him to quit work, without conditions imposed or promises exacted, is without consideration, and nonenforceable, in the absence of facts creating an equitable estoppel.

NEGOTIABLE INSTRUMENTS—CONSIDERATION—ESTOPPEL.—If a note is given to the payee merely to enable him to quit work, and he has abandoned a lucrative occupation in anticipation of the note being paid, in accordance with the intentions of the maker, neither he nor his legal representatives can resist payment of such note on the ground that it is without consideration. The facts in such case create an equitable estoppel.

Ricketts & Wilson, for the plaintiff in error.

Lamb & Adams, for the defendant in error.

53 SULLIVAN, J. In the district court of Lancaster county the plaintiff, Katie Scothorn, recovered judgment

against the defendant, ⁵⁴ Andrew D. Ricketts, as executor of the last will and testament of John C. Ricketts, deceased. The action was based upon a promissory note, of which the following is a copy:

"May the first, 1891.

"I promise to pay to Katie Scothorn on demand, \$2,000, to be at 6 per cent per annum.

J. C. RICKETTS."

In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros. and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the executor. The material facts are undisputed. They are as follows: John C. Ricketts, the maker of the note, was the grandfather of the plaintiff. Early in May—presumably on the day the note bears date—he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses:

"A. Well, the old gentleman came in there one morning about 9 o'clock—probably a little before or a little after, but early in the morning—and he unbuttoned his vest and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, 'I have fixed out something that you have not got to work any more.' He says, 'None of my grandchildren work and you don't have to.'

"Q. Where was she?

"A. She took the piece of paper and kissed him; and kissed the old gentleman and commenced to cry."

It seems Miss Scothorn immediately notified her employer of her intention to quit work and that she did soon after abandon her occupation. The mother of the plaintiff was a witness, and testified that she had a conversation with her father, Mr. Ricketts, shortly after the ⁵⁵ note was executed, in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked and he did not think she ought to. For something more than a year the plaintiff was without an occupation; but in September, 1892, with the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with

Messrs. Funke & Ogden. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892 he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation. We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties. The testimony of Florence and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do or refrain from doing anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros. and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no *quid pro quo*. He gave the note as a gratuity and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit, being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the ⁵⁶ sum of money therein named. Ordinarily, such promises are not enforceable even when put in the form of a promissory note: *Kirkpatrick v. Taylor*, 43 Ill. 207; *Phelps v. Phelps*, 28 Barb. 121; *Johnston v. Griest*, 85 Ind. 503; *Fink v. Cox*, 18 Johns. 145, 9 Am. Dec. 191. But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration: *Barnes v. Perine*, 12 N. Y. 18; *Philomath College v. Hartless*, 6 Or. 158, 25 Am. Rep. 510; *Thompson v. Mercer County*, 40 Ill. 379; *Irwin v. Lombard University*, 56 Ohio St. 9, 60 Am. St. Rep. 727. In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the

donee, on the faith of the promise, constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration. Such seems to be the view of the matter taken by the supreme court of Iowa in the case of *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, where Rothrock, J., speaking for the court, said: "Where a note, however, is based on a promise to give for the support of the objects referred to, it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration." And in the case of *Reimensnyder v. Gans*, 110 Pa. St. 17, which was an action on a note given as a donation to a charitable object, the court said: "The fact is that, as we may see from the case of *Ryerss v. Trustees*, 33 Pa. St. 114, a contract of the kind here involved⁵⁷ is enforceable rather by way of estoppel than on the ground of consideration in the original undertaking." It has been held that a note given in expectation of the payee performing certain services, but without any contract binding him to serve, will not support an action: *Hulse v. Hulse*, 17 Com. B. 711; 84 Eng. Com. L. 709. But when the payee changes his position to his disadvantage, in reliance on the promise, a right of action does arise: *McClure v. Wilson*, 43 Ill. 356; *Trustees v. Garvey*, 53 Ill. 401, 5 Am. Rep. 51.

Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel in pais is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his posi-

tion for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy": 2 Pomeroy's Equity Jurisprudence, 804.

According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of ten dollars per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He, doubtless, desired that she should give ⁵⁸ up her occupation, but whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right and is affirmed.

NEGOTIABLE INSTRUMENTS — GRATUITY — CONSIDERATION.—A note executed by a father, payable to his son, with no consideration but natural love and affection, is a mere promise to give, for which there is no valid consideration, and which cannot be enforced against the executor after the father's death: *Fink v. Fox*, 18 Johns. 145, 9 Am. Dec. 191.

NEGOTIABLE INSTRUMENTS — CONSIDERATION.—A valid consideration for a note may consist of an injury to the payee, as well as of a benefit to the maker or to a third person: *Barrett v. Mahnken*, 6 Wyo. 541, 71 Am. St. Rep. 953.

YODER v. HAWORTH.

[57 NEBRASKA, 150.]

SALES—WHAT CONSTITUTES.—A contract providing that a person shall sell goods manufactured for him, on commission for the manufacturer's account, is an absolute sale when the price of the goods is fixed by the contract with terms of discount, and it also provides that cash received on sales shall be remitted to the manufacturer and credited on the indebtedness, and that notes taken shall be held as collateral security therefor, and that goods remaining unsold on a certain date are to be held subject to the manufacturer's order.

G. B. France, for the plaintiffs in error.

Gilbert Brothers, for the defendants in error.

150 RAGAN, C. This is an action of replevin brought in the district court of York county by George D. Haworth against Bartlett Y. Yoder and others. At the conclusion of the evidence the jury, in obedience to an instruction of the court, returned a verdict in favor of Haworth. To review the judgment entered upon this verdict Yoder has filed here a petition in error.

1. During the years 1893 and 1894 one Burr was engaged **151** in the business of selling agricultural implements in the city of York, Nebraska, and in said years acquired from Haworth under a written contract, hereinafter to be noticed, the possession of a lot of agricultural implements. In July, 1895, Burr was indebted to Kingman & Co. and to the Gale Manufacturing Company in a large sum of money. In satisfaction, or part satisfaction, of this indebtedness Burr sold and delivered to Kingman & Co. and to the Gale Manufacturing Company the property in controversy in this action, being property which he had acquired from Haworth under his contract with him hereinafter to be noticed. Haworth, claiming to be the owner of the property, sold and transferred by Burr to Kingman & Co. and to the Gale Manufacturing Company, brought this action of replevin therefor against Yoder, who was in possession of the property as the agent of Kingman & Co. and of the Gale Manufacturing Company. The contract between Burr and Haworth under and by virtue of which Burr came into possession of the property sold to Kingman & Co. and to the Gale Manufacturing Company was and is in the words and figures following:

"York, Neb., Jan. 11, 1893.

"Messrs. Haworth & Sons, Decatur, Ill.

"Please manufacture and deliver on board cars at Council Bluffs and ship to our address on or before the 15th day of March, 1893, the following bill of check rowers, to be sold on commission for your account, and subject to the following conditions, viz.:

No.	Width of Drop.	Remarks.	Price.	Total Amt.	Name of Kind.
25 planter.	$\frac{1}{2}$	Wide wheels...	\$24.00		Planter Ck. R.
25 Haworth steel.	"	" "	10.00		
10 Brown steel. . .	$\frac{3}{8}$				
20 coils wire.	$\frac{3}{8}$ 10				
10 " "	" 20				
14 " "	" 40				
10 " "	$\frac{1}{2}$ 20				
0 " "	" 10				
4 " "	" 40				

152 "If all is paid cash July 1, the net price of planters to be \$23.50, C. rowers \$9.50 each, and ten per cent off on extras.

"1st. All machines shall be received and immediately put in good store, free of expense to you, and we be your agent for all goods furnished us for sale on your account.

"2d. The freight and storage shall be paid by us and the amount shall form no part of any expense to be paid by you. All machines shall be forwarded in accordance with your orders, only collecting on such forwarded machines the freight and drayage paid on same, and I will carry insurance at my expense in such an amount as will cover loss by fire, lightning, or tornado.

"3d. All machines shall be sold for cash, or good farmers' notes taken in Haworth & Sons' name, payable not later than September first next, with ten per cent interest from day of sale; and all such notes shall be indorsed and the payment guaranteed by ———, and given to you as collateral on my note, which we will give you for the amount of my account unpaid July 1, 1893.

"4th. All notes shall be taken upon blanks furnished by you, with all the blank spaces fully filled in with ink.

"5th. All money and notes shall be forwarded to you immediately, either by mail or express, and a receipt taken therefor, none of which shall be converted to our use till complete settlement is made.

"6th. All extra orders for machines shall be upon the same terms and conditions as above, and will only be ordered upon valid orders taken by us.

"7th. All extras shall be sold for cash, and the amount immediately remitted to you as our employer, less thirty per cent from the extra list price for rope, wire, reels, and castings.

"8th. We further agree to see that all planters and check rowers sold by us are properly connected and operated as per directions when started to work, and be governed by the instructions.

¹⁵³ "9th. A final settlement shall be made for all machines and extras ordered, on or before June 1, 1893.

"10th. We further agree that should we neglect or fail to sell all of said planters and check rowers by the first day of July, 1893, to store in good order, free of charge, all planters and check rowers unsold, subject to your order.

"Yours truly,

"BURR & CO.

"HAWORTH & SONS.

"Exhibit 'A.' T. E. K., Rep."

The district court proceeded upon the theory that this contract was one of agency merely, existing between Burr and Haworth; that by virtue and because of the contract the title to the property furnished Burr thereunder never passed to him, but remained in Haworth. We think this conclusion of the learned district judge wrong. This is not a conditional contract of sale such as was construed in *Osborn v. Plano Mfg. Co.*, 51 Neb. 502; nor is it a contract of agency such as was construed in *National Cordage Co. v. Sims*, 44 Neb. 148, but it is an absolute and unconditional contract of sale such as was construed in *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 58 Am. St. Rep. 691. In the latter case, the contract between the parties provided that Mack was thereby appointed the agent of the manufacturing company to sell its tobacco at such prices as it might direct. Mack was to be paid a certain commission on all sales made if he sold the tobacco furnished him at the price fixed by the tobacco company; and, if he sold it for a less price, he was to have no commission. By the contract Mack was required to guarantee the payment of all tobacco shipped him by the manufacturer. Mack was to execute and deliver his notes due in sixty days for the tobacco furnished him by the manufacturer, and it was held that the contract was not one of agency for the sale of the

manufacturer's goods by Mack, but a contract of sale, and that the tobacco furnished Mack under the contract upon its delivery to him became his property. The contract involved ¹⁵⁴ in this action does provide that Burr shall sell goods furnished him by Haworth on commission and for Haworth's account. But this clause of the contract does not so dominate and control the other provisions thereof as to make it a contract of agency. By the contract Haworth was to manufacture the goods ordered by Burr and deliver them on board the cars at Council Bluffs and ship them to Burr's address before a certain date. The price which Burr was to pay for the goods was fixed in the contract. Burr was to pay the freight on the goods. He was to sell the goods for cash or take good farmers' notes therefor, and the notes were to be taken payable to Haworth and guaranteed by Burr, and delivered to Haworth. Now, were these farmers' notes so taken, guaranteed, and delivered by Burr to Haworth to be Haworth's notes? Not at all. But they were to be held by Haworth as collateral security for Burr's notes given to Haworth for the goods delivered. Burr was to make the settlement with Haworth on or before June 1, 1893, and by July 1st of said year was to give his note to Burr for the value of all goods received from Haworth; and to secure the payment of this note Haworth was to hold the farmers' notes which Burr had taken. Furthermore, when Burr sold any goods for cash or took farmers' notes, he was to remit these notes and cash to Haworth, the cash to be credited on Burr's indebtedness and the notes to be held as collateral security therefor. Again, the contract provided that if Burr paid for all the goods received by him by July 1st, then the net price of the planters furnished him, instead of being twenty-four dollars, was to be twenty-three dollars and fifty cents, and the price of the check rowers, instead of being ten dollars each, was to be nine dollars and fifty cents, and he was to have a discount of ten per cent on the price of all extras furnished. By the last clause of the contract it was provided that Burr would store the goods on hand unsold on July 1st, subject to Haworth's order. This was simply a promise on the part of Burr that the property unsold on July 1, 1893, should be held by Burr ¹⁵⁵ as security for what he owed. Our conclusion is, that the contract between Haworth and Burr was an absolute contract of sale, and that whatever property was delivered to Burr in pursuance of that contract became his property.

The judgment of the district court is reversed and the cause remanded.

SALES—CONTRACT, WHEN ONE OF SALE, NOT OF AGENCY.—An agreement between a manufacturer and a merchant, making him the agent of the manufacturer to sell tobacco at a certain commission at a price fixed by the manufacturer, and requiring him to warrant to pay for all tobacco received, and execute and deliver his notes for the same, is a contract of sale and not of agency: *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 58 Am. St. Rep. 691. In this connection, see *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854.

NORVAL v. ZINSMASTER.

[57 NEBRASKA, 158.]

PARENT AND CHILD—CUSTODY OF CHILDREN.—The custody of young children belongs of right to their parents, rather than to strangers, and a court cannot deprive a parent of such custody unless it is shown affirmatively that he or she is unfit to have such custody or has in some way forfeited the right.

PARENT AND CHILD—CUSTODY OF CHILDREN.—The right of a parent to the custody of his or her child is not divested or forfeited beyond recall by a letter written in a moment of caprice or discouragement.

PARENT AND CHILD—CUSTODY OF CHILDREN—DIVORCE.—If, under a decree of divorce, the custody of children has been given to one of the parents, the court should not, on habeas corpus proceedings, in effect give them into the custody of the other parent by committing them to his parents, unless the present custodian is affirmatively shown to be unfit or has forfeited his or her right to their custody.

W. W. Giffen and W. H. Jennings, for the plaintiff in error.

Tracey & Wild, for the defendant in error.

159 **IRVINE, C.** Annie J. Norval sued out a writ of habeas corpus against Jacob Zinsmaster, alleging the unlawful restraint by him of the applicant's two minor children. The district court, after a trial, awarded the custody of the children to the respondent, their paternal grandfather. From this order the applicant prosecutes error. The assignments of error reduce themselves to a question of the sufficiency of the evidence.

There is little real controversy as to the facts. The children are two girls, aged respectively eight and five, the offspring of a marriage between the applicant and George Zinsmaster, son of the respondent. In February, 1897, the applicant was awarded a decree of divorce on the grounds of drunkenness and extreme cruelty, and given the custody of the children. A

little more than six months thereafter the applicant intermarried with Walter Norval. The former husband was opposed to this step, and filed an application in the divorce case for a modification of the decree so as to award him the custody of the children. This application does not seem to have been brought to hearing; but, apparently influenced thereby, Mrs. Norval wrote to a son in law of respondent suggesting that the latter take the children. The letter not receiving an immediate response she addressed the respondent directly as follows: "I thought it best I should write to you about the girls. We have gotten word that George [the father] is working in an underhanded way to get them, and rather than have any fuss and go to law about them I will be willing for them to have their home with you. He can provide for them as much as he likes, but never have control over them to take them away in some other home, and that they can come and see me in vacation, providing they will stay there contented and happy. Now, let me know right away if this is satisfactory, and I will bring them down. They have a good home here and will always ¹⁶⁰ have, but to save trouble I would rather let them go there." The defendant in error, a German who could not write English, directed his adult maiden daughter to write Mrs. Norval that he would take the children if she would relinquish all claim upon them. The daughter wrote Mrs. Norval to bring the children to Cook, which seems to be the nearest railway station, but omitted to state the condition. The girls were sent to Cook about October 17, 1897, and were there met by their father, who took them to the home of the elder Zinsmasters. This proceeding was begun February 23, 1898.

No serious attempt is made to prove that either claimant is an unfit person to have the custody of the children. All the proof tends to show that the mother and the grandparents are estimable persons, exhibiting a deep affection for the children, and willing to provide for them to the extent of their respective means. Mrs. Norval resides with her husband in a small house at Avoca, Cass county. Norval is a section-hand on a railroad and derives his income chiefly from his wages as such. The grandparents own a farm of two hundred and forty acres near Tecumseh, and reside thereon. At each point good school facilities are convenient. The testimony of strangers as to the situation in either household is enlightened by that of the two little girls themselves, the innocent subject matter of the controversy. Each testifies, with apparent candor and freedom and

with manifest intelligence, that she has received uniformly kind treatment in each place, and that her wants have been supplied and gratified. The elder does not know which place she would prefer to live; the younger at one time says she wants to go home with grandma, in another that she does not care. The only objection made by the mother to the custody of the grandfather, and based on the welfare of the children, is that their father resides there and is an habitual drunkard. The only objection based on similar grounds made to their mother's custody is that Norval's income is quite limited and that he is addicted to drink. The ¹⁶¹ proof on the last point only tends to establish that on several occasions within six years, and on none since his marriage, he has been intoxicated. He is shown to be industrious and to devote his means to the support of the household. The result of the evidence is that both mother and grandparents are in themselves fit to maintain and rear the children. The stepfather is a poor man, but industrious. At times he has been intoxicated. As against this it is established that such is the frequent, if not usual, condition of the father, who resides with the grandparents, and who, by reason of his relationship, would probably be at least as closely associated with the children, should they remain, as would the stepfather, should the mother regain the custody. An attempt is made to show that the father does not live with the grandparents; but this attempt merely results in disclosing that he is without means of livelihood, apparently vagabondish in his habits, and stays at his father's home when he is not roaming among places which on the witness stand he refuses to divulge. The plaintiff in error asserts that her claim to the children is founded on the law of God. Without trespassing on the domain of theology, it must be conceded that it is based on a law which nature asserts and the statutes recognize. Section 6, chapter 34, of the Compiled Statutes provides: "The father and mother are the natural guardians of their minor children, and are equally entitled to their custody, and to care for their education, being themselves competent to transact their own business and not otherwise unsuitable." We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide.

The statute declares, and nature demands, that the right shall be in the parent, unless the parent be affirmatively ¹⁶² unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed, by revolution if necessary. In *Sturtevant v. State*, 15 Neb. 459, 48 Am. Rep. 349, the child was only a few months old, and the custody was taken from the father because he was unable personally to discharge duties which the custody imposed. *Giles v. Giles*, 30 Neb. 624, was a controversy between father and mother, where the natural rights were equal. *State v. Schroeder*, 37 Neb. 571, and *Schroeder v. State*, 41 Neb. 745, presented a case of affirmative unfitness of the father and of abandonment of the child.

We are not unmindful that the letter of Mrs. Norval, already quoted, indicates an intention, at the time it was written, of surrendering the children to their grandparents; but parentage in its full import is not to be so lightly surrendered. If, relying on the letter, the grandfather had maintained the children for a considerable period, using extensively of his means and energies, and forming deeply-seated ties of affection growing out of the association, such facts might be of controlling force. But, regarded as a contract, the letter is indefinite, and the motive of writing it was plainly to avoid the jeopardy of an attack by the father on the mother's rights. The children had remained but a few months, and the grandparents had not expended largely of their time or means on the faith of their continued control of the children. The right to custody of children implies a correlative duty of the very highest obligation. It cannot be divested or forfeited beyond recall by a letter written in a moment of caprice or discouragement. It is also to be observed that, under the circumstances, to award the custody to the grandfather is in effect to take the children from their mother and place them in constant association ¹⁶³ with their father, and so submit them to his moral control and direction, and this in conflict with the terms of the decree of divorce. This will not be done: *Eckhard v. Eckhard*, 29 Neb. 457. The right of the parent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture clearly established.

Reversed and remanded.

PARENT AND CHILD—CUSTODY OF CHILD.—Ordinarily, a father is entitled to the custody of his minor child, but if the welfare of the child is retarded by such custody, an exception to the rule exists: *Hussey v. Whiting*, 145 Ind. 580, 57 Am. St. Rep. 220; *Miller v. Miller*, 38 Fla. 227, 56 Am. St. Rep. 166.

PARENT AND CHILD—CUSTODY OF CHILD.—An oral agreement made by a father that a third person shall have the custody of his child during infancy does not preclude the father from reclaiming such custody: *Hussey v. Whiting*, 145 Ind. 580, 57 Am. St. Rep. 220, and note. A father may, by contract, release his right to the custody of his child to a third person, but the terms of such contract must be clear, distinct, and definite: *Note to Enders v. Enders*, 44 Am. St. Rep. 603.

PARENT AND CHILD—CUSTODY OF CHILDREN.—In habeas corpus by a mother against a father to recover possession of their minor children, awarded to the mother in divorce proceedings, evidence that the mother is unsuited to have control of them because of her immorality and pecuniary circumstances, and that the father is a more suitable person to have the custody of them, and better able financially to care for them, is sufficient to support a decree awarding the custody of such children to their father: *Kentzler v. Kentzler*, 3 Wash. 166, 28 Am. St. Rep. 21.

PEOPLE'S FURNITURE AND CARPET CO. v. CROSBY.

[57 NEBRASKA, 282.]

TENDER—AMOUNT—REFUSAL.—If a tender is refused because not deemed sufficient in amount, it cannot be avoided because too large an amount is tendered and the change demanded.

CONDITIONAL SALES—PART PAYMENT—DEMAND.—If goods have been sold, reserving title as security for the purchase money payable in installments, a large portion of which has been paid, and the vendor has accepted payments, after the day when payment should have been completed, he cannot retake the goods without notice and without demand. In such case, a tender on demand of the amount remaining due is sufficient to retain in the vendee the right of possession.

REPLEVIN—DEMAND—WAIVER.—If a demand is necessary, not only to lay the foundation for the remedy of replevin, but also to complete a right of possession in the plaintiff, the defendant, by denying the right of possession, does not waive the demand.

Duffie & Van Dusen, for the plaintiff in error.

F. W. Fitch, for the defendant in error.

283 IRVINE, C. The People's Furniture and Carpet Company sold to Mrs. Crosby a bedstead, mattress, and pillows for ninety-two dollars and fifty cents. The sale was evidenced by a written contract, under the guise of a lease with an option in the lessee to purchase. In legal effect, the contract was plainly one of conditional sale, the vendor reserving title as security

for the purchase money. Payments were made from time to time, not always according to the terms of the so-called lease, and some after the time when, by its terms, payment should have been complete. In this way there was paid altogether the sum of eighty-seven dollars, leaving five dollars and fifty cents unpaid. Mrs. Crosby thereafter sold, or attempted to sell, the bedstead and mattress to Ellis Coder, and gave him possession thereof. The People's company later sued out a writ of replevin for the goods, and they were taken from the possession of Coder. The suit was brought in the court of a justice of the peace. On appeal Coder recovered a judgment, and the plaintiff brings the case here on error.

A decision is sought on several points relating to the construction and legal effect of the contract, but the judgment must be affirmed on a consideration of only a part of the transactions. The writ of replevin was sued out against Mrs. Crosby alone—the original vendee. No demand was made upon her, nor was there ever any service of process upon her. An agent of the plaintiff went with the officer, while he held the writ, to the house of Coder, and there demanded the property. The agent informed Coder of the rights of the plaintiff, of which he seems to have been in fact ignorant, although charged with notice by a proper filing of the contract for record. As soon as possible, and before the property had been removed, Coder made a tender of the amount which the agent stated to be due. It is true that this amount was five dollars and fifty cents and Coder tendered six dollars, demanding the change; but the tender was not refused because not of a legal ²⁸⁴ character, but because the costs of the replevin proceedings were not included. When the tender is refused because not deemed sufficient in amount, and absolutely, it cannot be avoided merely because not in lawful money to the precise amount: *Guthman v. Kearns*, 8 Neb. 502; *Dakota Stock etc. Co. v. Price*, 22 Neb. 96. The officer then took the goods. Afterward, Coder made a precise legal tender to the plaintiff, and it was refused. Later Coder's name was inserted in the writ and other papers, and he appeared and defended. We think it is the law, and it certainly ought to be, that where goods have been sold, reserving title as security for the purchase money, a large portion thereof has been paid, and the vendor has accepted payments, as in this case, after the day when payment should have been completed, he is in no position to retake the goods without notice and without demand. In such case, a tender on demand of the amount remaining due is suffi-

cient to retain in the vendee the right of possession: *O'Rorke v. Hadcock*, 114 N. Y. 541; *Taylor v. Finley*, 48 Vt. 78; *New Home Sewing-Machine Co. v. Bothane*, 70 Mich. 443. Besides the objection to the tender already disposed of, it is said that it was not kept good, and that it should have included costs. The whole of the record before the justice of the peace is not before us. So far as we have the record here, the tender seems to have been kept good, and we need not therefore inquire whether it was necessary to do so. On the other point it is quite clear that there was, when the tender was made, no liability for costs. The cases (*Homan v. Laboo*, 1 Neb. 204; *Ogden v. Warren*, 36 Neb. 715; *Rodgers v. Graham*, 36 Neb. 730) cited as holding that no demand is necessary prior to bringing suit are cases where the question was as to the liability for costs at the close of the action, or where the attempt was to defeat an action in replevin for want of demand. In such cases, it is held that asserting a right in one's self avoids the necessity of a previous demand. In such cases, the demand reaches only the ²⁸⁵ question of procedure. It has not been held, nor is it the law, that, when a demand is necessary, not merely to lay the foundation for the remedy, but to complete a right of possession in the plaintiff, the defendant, by denying the right of possession, waives such requisite thereto. Under the rule above stated, the plaintiff was in no position to assert a right of possession until a demand had been made and there had been afforded an opportunity to make the remaining payment. The suit had been instituted without a demand. Coder was not a party, and the officer was then as to him a trespasser. He was not required to pay costs on his own account. Regarding him as the representative of Mrs. Crosby, the situation is the same. The plaintiff had no right of action against her until demand, not for the goods, but for the money. The writ had been sued out without such demand, and when tender was made she was not liable for the costs then accrued.

The point is not made, but it undoubtedly suggests itself, that interest was probably demandable from the time payment should have been made. The tender was made of the amount which the plaintiff's agent stated remained unpaid, and defendant had a right to rely on such statement.

Error is assigned on the admission in evidence of certain documents from the files of the justice. The case was tried to the court without the intervention of a jury, so these assignments are unavailing. Moreover, the evidence objected to was

competent and material as showing that when tender was made Coder had not been sued.

Affirmed.

A TENDER OF PAYMENT IS NOT OBJECTIONABLE because it is for a larger sum than the amount due, but a condition of receiving change in full cannot be imposed: Note to Moynahan v. Moore, 77 Am. Dec. 471, 476.

CONDITIONAL SALES—PAYMENT BY INSTALLMENTS. When goods are sold to be paid for in installments, with a stipulation that the vendor, on nonpayment of an installment, may retake the property, his right to resume possession is not lost by receipt of part of the sums of installments which are overdue. Moreover, the vendor may, instead of taking possession, maintain replevin, upon a breach, without previous demand upon the vendee: Note to Miller v. Steen, 89 Am. Dec. 128.

CLARKE v. NEBRASKA NATIONAL BANK.

[57 NEBRASKA, 314.]

EXECUTIONS—SUPPLEMENTARY PROCEEDINGS.—AN AFFIDAVIT for an order for the examination of a judgment debtor and his debtors in aid of execution, is insufficient, and will not support such order when based solely on averments made upon information and belief, especially when the sources and grounds thereof are not disclosed. The facts in such an affidavit must be set forth by positive averments.

J. L. Webster, for the plaintiff in error.

W. Switzler, for the defendant in error.

315 **NORVAL, J.** An opinion was filed herein at the September term, 1896, denying a motion to dismiss made on the ground that the order sought to be reviewed was not a final order, within the meaning of section 581 of the Code of Civil Procedure: Clarke v. Nebraska Nat. Bank, 49 Neb. 800. This submission is upon the merits. The Nebraska National Bank, on April 10, 1896, obtained a judgment in the district court of Douglas county against Henry T. Clarke and William E. Clarke for twelve thousand eight hundred and forty-three dollars and seventy-five cents, besides costs. On April 11, 1896, an execution was issued thereon, which was returned by the sheriff wholly unsatisfied. During the same month and year an alias execution was issued on said judgment, and, while the same remained in the hands of the sheriff wholly unsatisfied, there was filed with the clerk of the court below the affidavit of Lewis S. Reed, the

cashier of said bank, to institute proceedings in aid of execution. This affidavit is entitled in the cause in which the judgment was entered, and, after setting forth the facts already narrated, continues thus: "Affiant further says that said defendants have not personal or real property subject to levy or execution sufficient to satisfy the said judgment. Affiant further says that the said defendants are residents of Douglas county, Nebraska, and that said defendant Henry T. Clarke has property, as affiant believes and has reason to believe, which he unjustly refuses to apply upon said judgment. Affiant further says that he believes, and has reason to believe, that the First National Bank of Omaha, . . . John T. Clarke, and A. M. Clarke, and each of them, have property of the judgment debtor, Henry T. Clarke, and are indebted to said judgment debtor, Henry T. Clarke, and further affiant saith not." The district court on the same day made an order requiring Henry T. Clarke and the persons and corporations named in the affidavit to appear at a time and place designated and make answer under oath to ³¹⁶ all such questions as should be propounded to them relative to the property of said Henry T. Clarke. The latter moved to vacate the said order for examination, on the ground that the affidavit therefor was insufficient to justify the said order, which motion was denied, and this ruling is now before us for review.

The affidavit of Lewis S. Reed is assailed upon three grounds, only one of which will be noticed, namely, that the averments therein having been made upon information and belief without disclosing the sources of the affiant's information or the grounds for his belief, render the affidavit fatally defective. The proceeding below was instituted under sections 532-549 of the Code of Civil Procedure. Sections 533, 534, and 538 of said code read as follows:

"Sec. 533. When an execution against the property of a judgment debtor, or one of the several debtors in the same judgment, is issued to the sheriff of a county where he resides, or, if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from a probate judge or a judge of the district court of the county to which the execution was issued, requiring such debtor to appear and answer concerning his property, before such judge, or referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued.

"Sec. 534. After the issuing of an execution against property, and upon proof by affidavit of the judgment creditor or otherwise, to the satisfaction of the district court, or a judge thereof, or a probate judge of the county in which the order may be served, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a time and place in said county to answer concerning ³¹⁷ the same. And such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are prescribed in this chapter."

"Sec. 538. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear, at a specified time and place, within the county in which such person or corporation may be served with the order to answer, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party in the action in such manner as may seem to him proper."

These sections were adopted by the territorial legislature of 1858, and have remained upon the statute book until the present time, although in the various published statutes section 534 has not always been printed the same. In the Revised Statutes of 1866 and the several editions of the Compiled Statutes said section is printed to read "such court or judge may by order require the judgment creditor to appear," etc., while in the Session Laws of 1859, section 474, page 188, the year said section was enacted as a law, and also in the General Statutes of 1873, the section is published precisely as quoted above. The original enrolled bill on file in the office of the secretary of state we have not examined. Manifestly, the legislature intended to provide for the examination of the judgment debtor, and not his creditor, and for the purpose of the present investigation we shall so construe the section.

It is insisted by counsel for the bank that no affidavit was necessary to obtain an order for the examination of Henry T. Clarke, since one execution which had been ³¹⁸ issued on the judgment had been returned unsatisfied. This argument is

based upon the wording of section 533, which provides for the examination of a judgment debtor when an execution against his property has been returned unsatisfied in whole or in part, and contains no expression, as is found in sections 534 and 538, that the order for examination may be issued after satisfactory proof "by affidavit of the judgment creditor, or otherwise," or "by affidavit [of the party], or otherwise." In our view, it is unnecessary to determine in this cause whether the order requiring the debtor to appear and make disclosure must be based upon competent proof in the form of an affidavit or other testimony, because it is very evident that this proceeding was not instituted under said section, but under sections 534 and 538 of said code. The last section, it will be observed, relates to the examination of the judgment debtor's debtor, and section 534 makes provision for the examination of the judgment debtor when execution has been issued and no return thereof has been made. Section 533 authorizes the making of the order only after the return of the execution in whole or in part unsatisfied, and section 534 allows the order to be issued where no return of the execution has been made. Had the bank desired to proceed under the former section, no alias execution should have been taken out, but, having caused it to issue, it must comply with the provisions contained in section 534, which in clear and unmistakable terms require that the order for examination must be made upon proof by affidavit or otherwise, to the satisfaction of the court or judge, that the judgment debtor has property which he unjustly refuses to apply on the judgment.

The order for examination refers to the affidavit of Lewis S. Reed, and makes the same a part thereof by such reference, and, it not being disclosed from the face of such order, or evidence aliunde, that it was predicated upon evidence other than said affidavit, no other inference is permissible than that the affidavit, and nothing ³¹⁹ else, was the foundation of the proceeding, and that the order of examination was based thereon.

We will now consider the sufficiency of the affidavit. It cannot escape observation that more than one of the material averments therein are not sworn to positively, but are in express terms made upon the mere belief of the affiant. Then it is not alleged as a fact that Henry T. Clarke has property which he unjustly refuses to apply on the judgment, but merely "as affiant believes, and has reason to believe," and in the same manner it is stated that the several persons and corporations named in the affidavit have property of the judgment debtor or are indebted

to them. At no place in the affidavit is the source of the information from which the affiant formed his belief of the matters alleged, nor is a single fact alleged from which it could be inferred that Clarke has property which he unjustly refused to have applied on the judgment in question, or that any one of the persons or corporations designated in the affidavit is his debtor. The statute does not say that the order for examination may issue upon an affidavit made upon information and belief, but, before the order can go, it is required to be established to the satisfaction of the court or judge by affidavit of the judgment creditor or otherwise that the statutory grounds exist for the issuance of the order. An affidavit made upon information and belief merely, or upon the belief of the affiant, does not meet the requirements of sections 534 and 538. This view is strengthened by the consideration of section 244 of the Code of Civil Procedure relating to the issuance of summons in garnishment. That section expressly provides that the summons shall issue when an affidavit is filed by the execution creditor, his agent or attorney, stating "that he has good reason to and does believe that any person or corporation (naming them) have property of and are indebted to the judgment debtor." Under this section mere belief is all that is required of the affiant: *Burnham v. Doolittle*, 14 Neb. 214. Had the legislature ³²⁰ intended that an order requiring an examination of a judgment debtor may issue upon an affidavit made upon the belief of affiant, doubtless the statute in express terms would have so provided, especially as the law-making body was careful to insert a provision in section 244 of said code authorizing an affidavit to be made thereunder upon belief, or when the affiant entertains good reason to believe his averments. In other jurisdictions it has been decided that an affidavit for attachment is insufficient when made on information and belief: *Dunlevy v. Schartz*, 17 Ohio St. 640; *Garner v. White*, 23 Ohio St. 192; *Archer v. Claffin*, 31 Ill. 306; *Wilson v. Arnold*, 5 Mich. 98; *Pierse v. Smith*, 1 Minn. 82; *Neal v. Gordon*, 60 Ga. 112; *Greene v. Tripp*, 11 R. I. 424; *Steuben County Bank v. Alberger*, 78 N. Y. 252; *Bray v. McClury*, 55 Mo. 128. It has been ruled that in an affidavit of merits in support of a motion to open a default the averments should be positive, and not upon information and belief: *Hitchcock v. Herzer*, 90 Ill. 543; *Brown v. Cowee*, 2 Doug. 432; *Adamson v. Wood*, 5 Blackf. 448; *Jenkins v. Gamewell etc. Tel. Co.* (Cal., Nov. 30, 1892), 31 Pac. Rep. 570. An application for a change of venue based solely on an affidavit in which the statements therein are made upon be-

lief is fatally defective: *McCormick Harvesting Machine Co. v. Hayes*, 7 Kan. App. 141. And the same rule ought to and does apply to an affidavit made under section 534 of the Code of Civil Procedure. It requires proof to be made to the satisfaction of the court or judge before the order for examination of the judgment debtor shall issue. How can a court or judge be satisfied that a "judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment" upon mere statements contained in an affidavit made upon belief? If a witness should in an oral examination testify to matters upon information and belief, his evidence would be disregarded, because it would prove nothing, and the same rule applies to affidavits made upon information and belief, unless ³²¹ the statute clearly permits them to be so made, at least where the grounds of the belief and the source of the information are not stated in the affidavit. In the language employed by the court in the opinion in *Mowry v. Sanborn*, 65 N. Y. 581: "It may, as a general rule, be safely affirmed that, in the sense of the law, a general assertion of a fact in an affidavit upon information and belief proves nothing. A witness would not be allowed on the trial of a cause, in any court, to give evidence of a fact which he only knew from information derived from another, or which he simply believed to be true. The commonest process in our courts designed to affect the property or person of a party, which do not issue of course, cannot be properly obtained upon sworn statements made upon information and belief only. And, in cases of substituted service of any kind of process, an order which in some cases may, by virtue of some statute, be obtained upon proof made upon information and belief, the sources of information and the grounds of belief must be specifically set forth to enable the judicial mind to determine whether the information and belief is well or ill founded." The provisions of the Code of Civil Procedure of the state of New York relating to proceeding in aid of execution are quite like those in this state. There the statute authorizes the order requiring the judgment debtor to appear and be examined to be issued "upon proof, by affidavit, or other competent written evidence, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment": 2 *Stover's Annotated Code*, sec. 2436. It has been frequently decided that an affidavit under said provision must allege the facts positively, and, if stated upon information and belief without divulging the source of information, the affidavit is insufficient: *Bradner on*

Supplementary Proceedings, 38, 80; Bowery Bank of New York v. Widmayer (N. Y. City Court, 1890), 9 N. Y. Supp. 629; Kahle v. Muller, 57 Hun, 144; 11 N. Y. Supp. 26; Leonard v. Bowman, 61 Hun, 622; 15 N. Y. Supp. 822; In re Leslie, 19 Misc. Rep. 667; 44 N. Y. Supp. 1103; Pierce v. Parish, 28 N. Y. App. Div. 22; ³²² 50 N. Y. Supp. 735; Netzel v. Mulford, 59 How. Pr. 452; Day v. Lee, 52 How. Pr. 95; Manken v. Pape, 65 How. Pr. 453.

Counsel for the bank have cited four decisions to sustain the sufficiency of the affidavit—three from the state of New York, and the other by the supreme court of North Carolina—which we will now notice.

Teft v. Epstein, 17 N. Y. Civ. Proc. 168, 7 N. Y. Supp. 897, and Grinnell v. Sherman (N. Y. Sup. Ct. 1891), 11 N. Y. Supp. 682, held that an affidavit on information and belief was sufficient, but those cases were overruled on that point by the opinion in In re Leslie, 19 Misc. Rep. 667, 44 N. Y. Supp. 1103.

Miller v. Adams, 52 N. Y. 409, contains language to the effect that an affidavit upon information and belief was sufficient whereon to base an order for an examination of a judgment debtor's debtor, but what is said in the opinion on that subject is mere obiter, and the court in the opinion expressly stated that "as it is unnecessary to determine this question in this case, I shall not discuss it, nor is it passed upon by the court."

In the North Carolina case (National Bank of Westminster v. Burns (N. C., Nov. 17, 1891), 13 S. E. Rep. 871) the affidavit made in aid of execution was substantially like the one at bar, and was held good. It was not assailed on the ground that the averments were upon information and belief, nor did the court discuss or refer to that feature of the affidavit.

Upon principle, as well as authority, we are constrained to hold that the affidavit of Lewis S. Reed was so defective as to make the order based thereon erroneous. The court below erred in refusing to vacate the order for the examination of the judgment debtor and his alleged debtors.

Reversed.

AN AFFIDAVIT UPON WHICH PROCEEDINGS SUPPLEMENTARY TO EXECUTION are based, which states as ground for examination of the judgment debtor "that, as deponent is informed and believes, the said defendant has property which he unjustly refuses to apply toward the satisfaction of the judgment," is insufficient to authorize the granting of the order. It should give the name of the deponent's informant, with his means of knowledge, and describe the property, and also allege a demand: *Note to Lathrop v. Clapp*, 100 Am. Dec. 506.

EDWARDS AND BRADFORD LUMBER CO. v. RANK.

[57 NEBRASKA, 323.]

FIXTURES—MACHINERY.—INTENTION OF PARTIES is a controlling consideration in determining whether machinery placed on premises for trade purposes remains personalty or becomes a fixture, and, if the vendor and vendee agree that it shall remain personalty, it so remains, unless innocent purchasers acquire rights in reliance upon its apparent character as a fixture.

FIXTURES—MACHINERY—CHATTEL MORTGAGE.—If a person purchases machinery and places it upon his premises, executing a chattel mortgage on such machinery to secure the payment of a portion of the purchase price, he thereby evinces his intention that such machinery shall remain personalty, though physically attached to the premises, and it must be so regarded by the courts, as against mechanics', mortgage, or other liens, and whenever the right of innocent third persons are not prejudiced thereby.

Powers & Hays, E. D. Wigton, and W. Coleman, for the appellant.

M. B. Slocum, Jay & Welty, J. T. Spencer, J. Fowler, R. E. Evans, and W. P. Warner, for the respondent.

324 NORVAL, J. This was a suit to foreclose a mechanic's lien for materials sold and delivered by the Edwards & Bradford Lumber Company, a corporation, to Murray Rank for the erection of a steam flouring mill upon certain real estate in South Sioux City, of which Rank was the owner of the undivided two-thirds and the estate of J. M. Moon, deceased, was the owner of the other one-third. Among those made parties defendants were the holders of mechanics' liens on the premises, and J. P. Twohig, and the Dubuque Turbine Roller Mill Company, who owned real estate mortgages thereon. Answers and cross-petitions were filed on behalf of said lienors and mortgages. **325** Subsequently, the Otto Gas-Engine Works intervened and set up a chattel mortgage on the engine in the mill, executed by Rank and others to secure the payment of the purchase price thereof. Upon the hearing a decree was entered allowing the Moon estate a one-third interest in the realty in the unimproved condition, dismissing the claim of the intervenor, awarding foreclosure of the various mechanics' liens and real estate mortgages and directing a sale of the property subject to the interest of the Moon estate, including the engine embraced in the intervenor's chattel mortgage. The Otto Gas-Engine Works prosecutes this appeal.

There is no controversy as to the facts. The several mechanics' liens and real estate mortgages are valid, and the decree

foreclosing them is correct. It is disclosed by the written stipulation of the parties that on July 15, 1893, and while the mill was being constructed, Murray Rank and those interested with him in the building of the mill entered into a written contract with Schleicher, Schumen & Co. for the purchase from the latter, to be used in operating said mill, the engine in controversy and the fixtures thereto belonging, for the sum of eighteen hundred dollars, of which amount four hundred and fifty dollars were to be deposited by the purchasers in the Citizens' State Bank of South Sioux City, to be held by it in trust until the conditions of said contract were complied with, and the remainder of the consideration was to be divided into three notes of four hundred and fifty dollars each, due in six, twelve, and fifteen months respectively from the date of the delivery of the engine. The purchasers were to be permitted to receive the engine on thirty days' trial, and, if found satisfactory upon such trial, the money so deposited was to be forwarded to Schleicher, Schumen & Co., and the purchasers were to execute their promissory notes as aforesaid. The engine was shipped and received as agreed, and having given satisfaction upon the trial thereof on October 26, 1893, the four hundred and fifty dollars were paid as agreed and the purchasers also executed and delivered to the vendor their three notes of four hundred and fifty dollars each, and secured ³²⁶ the payment thereof by a chattel mortgage on the engine, which was duly filed for record on November 2, 1893, in Dakota county. The notes were, before their maturity, for a valuable consideration sold and indorsed to the intervenor, the Otto Gas-Engine Works, and no part thereof has been paid. The engine was placed in an outside building upon a suitable brick foundation imbedded in the ground, being securely attached to said foundation by bolts. The tank was set upon a similar foundation of lighter construction, and the forty feet of gaspipe were buried under ground. The engine can be removed without substantial injury to the realty.

The vendors and purchasers alike treated the engine as personalty, and no innocent third parties will be prejudiced by the court holding that the engine did not become a fixture and a part of the real estate. The intention of the parties is a controlling consideration in determining whether the engine was personalty or a fixture. As was well said by Irvine, C., in the course of his opinion upon the same subject in Arlington etc. Co. v. Yates, 57 Neb. 286: "There is nothing in the nature of such machinery to stamp it as realty under all circumstances. It

may become so or not according to circumstances. If a man sells bricks or nails or shingles for the purpose of erecting a house, these cannot in their specific character be continued, after such use, as personalty, because their very nature forbids such a result; but when an article is of an ambiguous character, such that it may either remain personalty or become attached to the freehold, much depends on the intention of the parties. This is especially true of trade fixtures and of machinery for trade purposes, where they may be removed without substantially impairing, not the property, taking its value with them remaining, but the property considered separately. There it is held that where the vendor and vendee agree that they shall remain personal property they do so, unless, perhaps, where innocent purchasers have acquired rights in reliance upon their apparent character. ³²⁷ From the large number of cases illustrating this principle there may be cited the following, where the contest was between a vendor seeking to enforce the purchase price against the articles as personalty, and an execution purchaser of the real estate: *Sisson v. Hibbard*, 75 N. Y. 542; *Manwaring v. Jenison*, 61 Mich. 117; *Sword v. Low*, 122 Ill. 487."

In *Tift v. Horton*, 53 N. Y. 380, 13 Am. Rep. 537, the court gave expression to the following: "It is well settled that chattels may be annexed to real estate and still retain their character as personal property. . . . It may in this case be conceded that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid, and by the same agreement power was given to the plaintiff to enter upon the premises in certain contingencies and to take and carry them away. While there is no doubt but that the intention of the owner of the land was that the engine and boilers should ultimately become a part of the realty and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiff that the act of annexing them to the freehold should not change or take away the character of them as chattels until the price of them had been fully paid. . . . But it is contended that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the lands, and that

here the defendants, prior mortgagees of the real estate, were interested and have not expressed nor shown such intention. It is not to be denied that, as a general rule, all fixtures put upon the land by the owner thereof, whether before or after the execution of the mortgage upon it, become subject to ³²⁸ the lien thereof. Yet I do not think that the prior mortgagee of the realty can interpose before foreclosure and sale to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands, after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiff on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee, and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such an agreement upon the covenants in his conveyance of the lands. A prior mortgagee, who certainly has not been induced to enter into his relation to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto, has no greater right than a subsequent mortgagee. Neither could claim as subject to the lien of his mortgage personal property brought onto the premises with permission of the owner of the lands and not at all affixed thereto. Nor can either claim personal property as so subject from the mere fact of the affixing, where, by the express agreement of the owner of the fee and the owner of the chattel, its character as personal property was not to be changed, but was to continue, and it to be subject to the right of removal by the owner of the chattel on failure of performance of conditions."

The following authorities fully sustain the doctrine that the engine in question did not become a part of the real estate, and that the chattel mortgage given thereon to secure the payment of the balance of the purchase money is valid and binding: *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Crippen v. Morrison*, 13 Mich. 24; *Buzzell v. Cummings*, 61 Vt. 213; *Myrick v. Bill*, 3 Dak. 284; *Simmons v. Pierce*, 16 Ohio St. 215; *Sword v. Low*, 122 Ill. 487; *Tibbetts v. Moore*, 23 Cal. 208; *First Nat. Bank v. Elmore*, 52 Iowa, 541; *Carpenter v. Walker*, 140 Mass. 416.

³²⁹ The decree, so far as it refuses the intervenor a lien upon the engine and fixtures, is reversed and the cause is remanded to the court below to enter a decree foreclosing the chattel mortgage, giving the intervenor the first and paramount lien on said engine.

FIXTURES—TEST OF.—The chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold: *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166.

FIXTURES—WHEN DEEMED PERSONALTY.—Many things ordinarily considered fixtures may become personal property, as between the parties interested in the realty and fixtures, by agreement between them to that effect; but such agreement cannot alter the character of the property as to third persons: *Cross v. Weare Commission Co.*, 153 Ill. 499, 46 Am. St. Rep. 902. Compare *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889.

FIXTURES—AGREEMENT WITH VENDOR OF—MORTGAGEE.—Machinery annexed to the freehold so as to make it a fixture will not retain the character of personal property as against a mortgagee, because of an agreement between the vendor of the fixture and the owner of the freehold that such fixture shall remain the property of the vendor until paid for, if the mortgagee had no notice of such agreement: *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166, and note.

FIXTURES—CHATTEL MORTGAGES.—Chattels annexed to realty, which are subject to a chattel mortgage, remain subject to such mortgage as against every person having notice thereof: Note to *Campbell v. Roddy*, 6 Am. St. Rep. 898. If a chattel mortgage is executed upon machinery, after being annexed to the realty, and the instrument of title under which the mortgagor holds does not authorize the removal of such machinery, and removal would result in injury to the realty or fixture, an agreement by the parties that the machinery shall be treated as personalty does not preserve its character as such: *Cross v. Weare Commission Co.*, 153 Ill. 499, 46 Am. St. Rep. 902.

GREEN v. MORSE.

[57 NEBRASKA, 391.]

COURTS—EFFECT OF ADJOURNMENT.—An order adjourning court to a subsequent day in the term creates an intermission, but does not adjourn the term, and the court may revoke such order and reconvene before the time fixed thereby.

COURTS—EFFECT OF ADJOURNMENT—RECONVENTION.—If an order is made adjourning court to a subsequent day in the term, and judicial proceedings are had in the interval, it is to be presumed that the court regularly reconvened, under a revocation and vacation of such order of adjournment.

FORCIBLE ENTRY AND DETAINER.—A PURCHASER AT JUDICIAL SALE may maintain an action of forcible entry and detainer to recover possession of the property purchased when the judgment debtor was in possession at the time the judgment was rendered under which the sale was made.

FORCIBLE ENTRY AND DETAINER—WRIT OF ASSISTANCE—INJUNCTION.—The remedies by forcible entry and detainer and by writ of assistance in the original case are concurrent; and an injunction cannot be issued to restrain a proceeding in forcible entry and detainer merely because the court may proceed by writ of assistance.

FORCIBLE ENTRY AND DETAINER.—JURISDICTION of forcible entry and detainer proceedings is not ousted by a mere averment in an answer that such proceedings involve the question of title. The court has jurisdiction to proceed until the evidence discloses the fact that the title is involved.

SHERIFF'S DEEDS—REGULARITY.—A sheriff's deed, executed after confirmation of sale and before supersedeas of that order, and delivered after judgment of affirmance and filing of a mandate, is regular.

EVIDENCE.—A PLEADING is not competent evidence, in favor of the party pleading, of the facts averred therein.

G. E. Pritchett, for the appellant.

Wright & Thomas, for the respondent.

392 **IRVINE, C.** In this case, an appeal from an order granting a perpetual injunction, there is a motion to dismiss the appeal, based on the ground that the order appealed from was made in vacation and is therefore void. It is said that the October term of the district court of Douglas county was adjourned October 3, 1898, until November 1, 1898, and that the decree was rendered October 4th, during the **393** intermission.

At the bar, the question argued was whether, where there are seven judges in a district, concurrently holding the district court of a county, six may make an order of adjournment which will preclude the seventh from thereafter holding court during the allotted period of the term. An inspection of the record discloses no state of affairs raising precisely that question. What does appear is that the October term was begun and held October 3d; that on that day an order, apparently regular, made "by the court" and signed by six judges, was entered, adjourning the term until the first day of November. It then appears that the decree appealed from was entered October 4th by the one judge who did not sign the order of adjournment. The record does not disclose that it contains all the orders affecting the adjournment and holding of the court. There is a marked distinction between an adjournment sine die of a term of court, and those intermissions which inevitably occur during a term. A court has the inherent power during the term of suspending business, as occasion may require, from one hour or one day to another. In this respect there is no difference between an adjournment from one day to the next, and an adjournment to a more distant day. In either case the term continues, and, while during the intermission the functions of the court are for some purposes suspended, still the court remains in existence and it is still term time. The judges do not by such an order lose all

power of control over the sessions, and may revoke the order of adjournment and reconvene before the time first fixed: *Bowen v. Stewart*, 128 Ind. 507; *Wharton v. Sims*, 88 Ga. 617; *Cole County v. Dallmeyer*, 101 Mo. 57. While this record discloses an apparently regular order of adjournment until November 1st, it also discloses the conduct of judicial business October 4th, and it must be presumed that there had been a reconvention of the court and a rescission of the order of adjournment, whether by regular order vacating the former or by action equivalent thereto is not material: *Clough v. State*, ³⁹⁴ 7 Neb. 320. The motion to dismiss the appeal must, therefore, be overruled.

In what has been said it has not been the intention to convey any inference whatever as to what would be the rights of litigants who, relying on the order of adjournment, had absented themselves for want of notice of the reconvention of the court, or of those who might, although with notice, be unprepared for a trial thus brought on prior to the time on which they might, perhaps, rely as the earliest when trial could be demanded. This record does not disclose that there was any surprise. Both parties were present, and no objection appears to going to trial at the time trial was had.

We are thus brought to the merits of the appeal. The case was a proceeding in foreclosure. A decree was rendered, a stay taken, the land then sold, the sale confirmed, and an appeal taken by the defendant from the order of confirmation. By this court the order of confirmation was affirmed. A mandate was sent to the district court commanding the enforcement of the order. A deed was issued to the purchaser, who demanded possession, and possession was refused. The purchaser then instituted an action in forcible entry and detainer for the recovery of possession of the property. The defendant then filed in the original case a supplemental petition, asking an injunction to restrain the purchaser from prosecuting the forcible entry and detainer case and from interfering with defendant's possession. It is the order making a temporary injunction of that character perpetual that is appealed from.

We are not favored with a brief in defense of the order of the district court, and we are decidedly of the opinion that it is entirely indefensible. The supplemental petition, aside from reciting the proceedings in the case, alleges that the cause is still pending in the district court to carry out the mandate; that the plaintiff has filed "a pretended deed," dated and executed while

the order of confirmation was superseded by the former appeal; that ³⁹⁵ the property is defendant's homestead; that the forcible entry and detainer case will necessarily raise the question of title; and that the court where that is depending is, therefore, without jurisdiction. These averments show no right to relief by injunction. The Code of Civil Procedure, section 1020, expressly makes the remedy of forcible entry and detainer available "in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree by virtue of which such sale was made." It was shown that such was the case here. Where that remedy is given, that and a writ of assistance are concurrent remedies: *Kessinger v. Whittaker*, 82 Ill. 22. The pursuit of the former did not oust the district court of whatever jurisdiction it had retained, and was not an usurpation of that jurisdiction. Nor were the forcible entry and detainer proceedings without jurisdiction because of the averment in the supplemental petition here that they would require an inquiry into the title of land. Even an answer to that effect in the forcible entry suit would not oust the jurisdiction. The court might still proceed until the evidence should disclose that the question involved was one of title: *Pettit v. Black*, 13 Neb. 142; *Lipp v. Hunt*, 25 Neb. 91. The averment that the deed to plaintiff was executed while the order of confirmation stood superseded, even if it could give or contribute to the right of an injunction, was not sustained. The answer averred that the deed had been executed before the supersedeas was effected, and that it had not been delivered until after affirmance and the receipt of the mandate. There was no reply, and this averment therefore stood admitted. Moreover, it was proved at the trial. The deed was therefore both executed and delivered while the judgment was enforceable. Of course, the averment, in the supplemental petition that the premises constituted a homestead was of no force whatever to prevent the carrying into effect of a decree, unappealed from, ordering the ³⁹⁶ sale of the property, and of an order of confirmation following such sale.

It may further be remarked that the only evidence the defendant offered to prove the averments of the supplemental petition was that somewhat remarkable document itself. A pleading in a cause is not competent evidence to prove the facts therein averred.

The judgment of the district court is reversed, the perpetual and the temporary injunctions both dissolved, and the supplemental petition dismissed.

COURTS—ADJOURNMENTS AND CONVENTION.—Matters of continuance or postponement are entirely within the discretion of the trial judge, whether the case is a civil or criminal one: *Commonwealth v. Donovan*, 99 Mass. 425, 96 Am. Dec. 765. A court of general jurisdiction is presumed to have complied with the law in ordering a special term, when the statute authorizes the judge to call a special term of court in vacation: *Cook v. Skelton*, 20 Ill. 107, 71 Am. Dec. 250.

FORCIBLE ENTRY AND DETAINER.—A PURCHASER AT A SHERIFF'S SALE, who seeks to recover lands from the defendant in execution, must produce a valid judgment, an execution, and a sheriff's deed. To require him to show that his purchase was legal and valid is not requiring the trial of title in such action: *Johnson v. Baker*, 38 Ill. 98, 87 Am. Dec. 293. The question of title in actions of forcible entry and detainer is the subject of a monographic note to *Beeler v. Cardwell*, 77 Am. Dec. 552-557.

SHERIFF'S DEED.—FAILURE OF THE SHERIFF TO MAKE a deed to the execution purchaser, and failure of such purchaser to pay the amount of his bid to the sheriff immediately, do not affect the latter's title: *Baker v. Clepper*, 26 Tex. 629, 84 Am. Dec. 591.

PLEADINGS AS EVIDENCE.—A bill in chancery is not evidence, in another suit, of facts therein alleged: Note to *Owens v. Dawson*, 26 Am. Dec. 51. Allegations in an answer not responsive to the bill are not evidence in favor of the defendant, but, to be available as a defense, must be proved: *Harding v. Hawkins*, 141 Ill. 572, 33 Am. St. Rep. 347. Allegations in an unverified bill are not evidence against the complainant: *Rankin v. Maxwell*, 2 A. K. Marsh. 488, 12 Am. Dec. 431.

SACKETT v. MONTGOMERY.

[57 NEBRASKA, 424.]

NEGOTIABLE INSTRUMENTS—TRANSFER WITHOUT INDORSEMENT—ASSIGNMENT.—A note payable to a person or order may be transferred by the payee, without a commercial indorsement, by either an oral or a separate, distinct, written assignment thereof, followed by delivery. The transferee is, in such case, liable to any defenses against the original payee.

JUDGMENT—MERGER.—A judgment on a note void for want of jurisdiction of the person of the defendant is not a bar to a subsequent action on the same note.

Spear & Mack, for the plaintiff in error.

J. S. Armstrong, H. C. Vail, and Montgomery & Hall, for the defendant in error.

425 NORVAL, J. Milton Montgomery sued F. M. Sackett, and obtained judgment against him on a promissory note executed by the defendant and one John Dickenson, and payable to Montgomery & Jaycox, or order. Two defenses were presented, namely, that plaintiff was not the owner of the note, and that

the payees had already obtained judgment against both makers for the full amount due thereon. Since the docketing of the cause in this court the death of the plaintiff below was suggested, and, by agreement of parties, an order was duly entered reviving the action in the name of his executors.

As to the ownership of the note, the evidence, without contradiction, shows that at the date of the institution of suit said Milton Montgomery was the owner of the paper, and on his behalf it was produced and introduced in evidence on the trial. The note was payable to the order of the payees, but did not contain their indorsement. This fact, however, did not prevent an equitable assignment of the paper to the decedent. A note payable to a party or order may be transferred by the payee, without a commercial indorsement, by either an oral or a separate, distinct, written assignment thereof, followed by delivery, which would render the transferee liable to any defenses against the original payee: *Doll v. Hollenbeck*, 19 Neb. 639; *Colby v. Parker*, 34 Neb. 510; *Gaylord v. Nebraska Savings etc. Bank*, 54 Neb. 104, 69 Am. St. Rep. 705; *Marskey v. Turner*, 81 Mich. 62; *Benson v. Abbott*, 95 Ga. 69; *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 56 Fed. Rep. 849.

As to the plea of estoppel by reason of a former judgment, the record discloses the following facts: On June ⁴²⁶ 15, 1894, which was prior to the bringing of this action, Montgomery & Jaycox caused to be docketed a suit on the note in question against both makers before H. C. Vail, as a justice of the peace of Boone county. Summons was issued returnable on June 20th. The day preceding the time fixed for the return of the writ, John Dickenson, one of the makers of the note, appeared before the justice, waived process, and confessed that he was indebted to the plaintiffs in the sum of eighty-four dollars and two cents upon said note. The justice inadvertently rendered judgment against both Dickenson and Sackett for said sum. Nearly a year afterward, at the request of the latter, and for the purpose of correcting a clerical error merely, the docket entry was changed to show a judgment against Dickenson only. There is considerable discussion in the brief of the power and authority to amend or change the judgment entry, but, in our view, it is wholly unnecessary to consider or pass upon the question. It was shown that Justice Vail never acquired jurisdiction over the person of Sackett; hence the judgment as against him was a nullity, and constituted no bar to the present action: *Colby v. Parker*, 34 Neb. 510. No reversible error appearing upon the face of the record the judgment is affirmed.

NEGOTIABLE INSTRUMENTS.—The transferee of a note without indorsement acquires no better title than had the payee; he holds it subject to all equities existing between the original parties, though he has paid full consideration without notice thereof: *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628; *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 16 Am. St. Rep. 765.

JUDGMENTS—RES JUDICATA.—A judgment rendered by a court acting without jurisdiction is a nullity, and is no bar to a suit subsequently instituted on the same cause of action: *Reading v. Price*, 3 J. J. Marsh. 61, 19 Am. Dec. 162; *Ditch v. Edwards*, 1 Scam. 127, 26 Am. Dec. 414. For instances of what is, and what is not, res judicata, see notes to *Hawk v. Evans*, 14 Am. St. Rep. 250-252; *Gayer v. Parker*, 8 Am. St. Rep. 229; *Jordahl v. Berry*, 72 Minn. 119, 71 Am. St. Rep. 469.

NEW LINCOLN HOTEL COMPANY v. SHEARS.

[57 NEBRASKA 478.]

LIENS—PRIORITY OF—LEASE AND CHATTEL MORTGAGE.—A lien for rent created by lease to become operative against personal property afterward to be brought upon the leased premises, but not yet capable of description, because not segregated, from a stock of goods of which it forms a part, is inferior to the lien of a chattel mortgage on such property, executed after it was placed upon the premises, and with notice of the lien attempted to be created by the lease.

J. H. Broady and Harwood, Ames & Pettis, for the appellants.

Pound & Burr, Wharton & Baird, and A. W. Field, for the respondents.

478 RYAN, C. This action for the foreclosure of an alleged lien by virtue of a provision in the lease hereinafter described was successfully prosecuted in the district court of Lancaster county. The First National Bank of Lincoln and the personal representatives of John L. Carson have appealed from the decree whereby the mortgage to the bank and Carson was found and decreed junior and subject to the lien of the New Lincoln Hotel Company, which has succeeded by assignment to the rights of the Lincoln Hotel Company, the original lessor. From the fact that briefs have been filed only on behalf of the **479** aforesaid bank and the personal representatives of Carson as appellants, and of the New Lincoln Hotel Company and Jacob E. Markel as appellees, we assume that the controversy is between those parties alone, and hence shall content ourselves with quoting and describing such findings of the district court as affect the

interests of these parties in this appeal. These findings were as follows:

"1. On the sixteenth day of October, 1890, the Lincoln Hotel Company, a corporation, by lease of that date, demised certain premises, to wit, the Hotel Lincoln, in the city of Lincoln, Nebraska, to Samuel Shears and Jacob E. Markel for a term of ten years from the first day of December, 1890, to the first day of December, 1900.

"2. The lease contained the following provisions, to wit: That upon the nonpayment of the whole or any part of the said rental at the time when the same as above is promised to be paid, or upon violation or nonfulfillment of any of the covenants of this lease, the said party of the first part may, at its election, either distrain for the rent due and damages sustained, and shall have a lien upon all the personal property of the party of the second part at any time in or upon the said premises for the payment of rent and for the security of each and every covenant herein contained, and the party of the first part may also declare this lease at an end and recover possession as if the same were held by forcible detainer. The said party of the second part hereby waives any notice of such election or any demand for the possession of the said premises.

"3. On the sixteenth day of October, 1890, the building was in process of erection and was not ready for occupancy as a hotel until after January 1, 1891.

"4. By an oral agreement between the parties to said lease, rent did not commence until January 15, 1891, and none of the property of the lessees involved in this suit was placed in said building until after December 1, 1890.

480 "5. In the latter part of October, 1890, Shears and Markel, the lessees, placed with Dewey & Stone, of Omaha, an order for furniture amounting to over \$11,000 in value, for the Lincoln Hotel, and the same was placed therein by them, mainly in the month of December, 1890. Said lessees, on the 28th of October, 1890, placed with the Union Porcelain Works in Greenport, Long Island, an order for chinaware for said hotel, stamped 'The Lincoln,' which chinaware was delivered to said lessees at Brooklyn, New York, December 3, 1890, and thereafter placed by them in said hotel. On November 6, 1890, said lessees placed an order with Reed & Barton, of New York and Taunton, Massachusetts, for silverware for the Hotel Lincoln, which, in value nearly \$1,600, was delivered to said lessees at Taunton, Massachusetts, and shipped from there to said lessees

at Lincoln, December 20, 1890, and January 10, 13, 14, 1891, and was placed in said hotel on arrival at Lincoln. On November 8, 1890, said lessees placed with the John Van Range Company, of Cincinnati, Ohio, an order in value over \$1,500 for ranges, boilers, and culinary utensils for the Hotel Lincoln, shipped November 26, 1890, from Cincinnati, and on arrival placed in said hotel, where all said personal property has since remained and now is."

"9. The Lincoln Hotel Company, a corporation, said lessor, on or about the — day of April, 1893, sold its said hotel property to the plaintiff in this suit and assigned its said lease to the plaintiff.

"10. A copy of the said lease and assignment was by the plaintiff filed in the office of the county clerk of Lancaster county on the twenty-fourth day of January, 1895.

"11. Rent to the amount of \$10,500, to wit, from the first day of December, 1893, to the first day of March, 1895, is due to plaintiff from defendants."

Mary P. Shears and Stuart Shears had succeeded to the rights and liabilities of Samuel Shears and Jacob E. Markel before February 2, 1895, and on that day executed a chattel mortgage on all the personal property ⁴⁸¹ in the Lincoln Hotel to secure a note owing by them to John L. Carson and another note owing by them to the First National Bank of Lincoln. The amounts of these notes are indicated in the conclusions of law hereinafter set forth. This mortgage was filed for record on the day of its execution. It was found by the court that the bank and Carson had actual notice of the provision by which the hotel sought to create a lien for rent before said lease was recorded.

Upon the facts found there were the following conclusions of law: "1. The plaintiff is entitled to a valid and subsisting and first lien upon all the personal property of Shears and Markel, in the possession of Shears & Shears in the Hotel Lincoln, on the first day of March, 1895, for the sum of \$10,500 with interest at seven per cent from said first day of March, 1895; 2. That the defendants, the First National Bank and John L. Carson, have a valid and subsisting and second lien upon said personal property contained in said hotel—the said bank for the sum of \$4,489.80, with interest at ten per cent from February 14, 1896, and the said Carson for the sum of \$3,126.81 with ten per cent from the fifteenth day of February, 1896; 3. That the defendants Hargreaves Brothers have a valid, subsisting,

and third lien upon said property for the sum of \$1,053.19, with interest at the rate of seven per cent per annum from August 23, 1895; 4. That said liens are due, unpaid, and plaintiff and said defendants are entitled to have said liens foreclosed and said property sold according to law."

In accordance with the above findings and conclusions, the lien of the hotel company was declared paramount to that of the bank and the representatives of Carson, and the question which we feel called upon to determine is whether or not this adjustment of priorities was correct. The appellees insist that the provision of the lease quoted in the second finding of fact operated as though ⁴⁸² a lease had been made October 16, 1890, contemporaneously with which there had been executed a chattel mortgage to secure payment of the rent, upon all the personal property of the lessee at any time in or upon the demised premises, and we shall accept this assumption as being correct. While this lease was of date October 16, 1890, it is evident from the findings hereinbefore quoted that not until afterward was any of the personal property ordered or selected for use in the hotel. All of the property was sent upon orders placed in other cities than Lincoln, and the delivery in Lincoln was delayed by reason of the unfinished condition of the hotel building until in December of 1890 and January of 1891.

The appellees insist that there is no party to the record who can question the validity of the provision for the reservation of a lien in the lease, because the bank and Carson were mortgagees with notice, and were not, therefore, mortgagees in good faith. We cannot see that the validity of the provision of the lease is affected by this consideration. Whether or not a chattel mortgage or its equivalent can be made so as to affect future acquired property is a question entirely dependent upon general principles independent of statute.

The case most directly in point for the appellees is *Wright v. Bircher*, 72 Mo. 179, 37 Am. Rep. 433. The scope of that opinion is accurately reflected in that portion of the syllabus which is as follows: "The proprietors of a hotel took a lease for a term of years upon an unfinished building to be used when completed as part of their hotel. The rent was payable monthly. The lease was to commence, or take effect, on the first of the month after the completion of the building. It contained a stipulation that all fixtures, furniture, and other improvements should be bound for the rent. When the lease was signed, the house was unfurnished, but before it took effect

certain furniture and fixtures had been placed in the house. Held, that the stipulation created a lien, valid at least in equity; that this lien was for the full amount of the ⁴⁸³ rent reserved, and not simply for any portion that might from time to time become delinquent, and that it had priority of a mortgage given after the lease took effect, but before any rent became delinquent, to a person having knowledge of the existence of the stipulation." While we cannot approve the conclusion reached, there is in the opinion such a fair statement of the attitude of the courts with reference to the validity of a lien in the case stated that we shall borrow the language of Henry, J., premising, however, that we have examined the numerous cases cited by counsel in this case and not noted in the opinion from which we quote, with the result that they serve but to increase the number of citations which might have been made in support of one or the other of two lines of cases. The language which we borrow is as follows: "One of the principal questions discussed by counsel relates to the validity of a sale or mortgage of goods and chattels not in esse at the date of the mortgage or sale. One might write a volume, if inclined, to review all of the adjudged cases on the subject. We are not so inclined, and deem it necessary only to state what we regard as the conclusion reached by the best considered cases. It has been frequently and ably discussed, both in English and American courts, and highly respectable authorities might be cited in support of either of the opposite views urged by the respective counsel here. The earlier English and American authorities, we think, sanction the doctrine contended for by the counsel of Nannie M. Wright [the mortgagee]: *Jones v. Richardson*, 10 Met. 488; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Gardner v. McEwen*, 19 N. Y. 125; *Head v. Goodwin*, 37 Me. 187; *Barnard v. Eaton*, 2 Cush. 294; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306, 38 Am. Dec. 368; *Codman v. Freeman*, 3 Cush. 306; *Otis v. Sill*, 8 Barb. 108; *Lunn v. Thornton*, 1 Man., G. & S. 379. The doctrine maintained in most of the cases was clearly stated in *Otis v. Sill*, 8 Barb. 108, and was, substantially, 'that a grant of goods not in existence, ⁴⁸⁴ or which do not belong to the grantor at the time of the execution of the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the goods; that an assignment of property to be acquired in future, if valid in equity, is only valid as a contract to assign when the property shall be acquired, and is not an assignment of a present interest in the property, and, if enforced

in equity, can only be enforced as a right under the contract, and not as a trust attached to the property as against the creditors of the assignor or mortgagor; that the mortgage of such subsequently acquired property can only be regarded as a mere contract to give further mortgage on such property, binding on the mortgagor personally, and the only remedy of the mortgagee on such contract is as a general creditor.'

"The broadest contrary doctrine was announced by Mr. Justice Story in *Mitchell v. Winslow*, 2 Story, 630, in the following language: 'It seems to me a clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, . . . whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy.' This has been followed by this court in the case of *Page v. Gardner*, 20 Mo. 508; in New York in the case of *Seymour v. Canandaigua etc. R. R. Co.*, 25 Barb. 305, in which *Otis v. Sill*, 8 Barb. 108, was cited and distinctly disapproved; also in *Sillers v. Lester*, 48 Miss. 526; *Benjamin v. Elmira Ry. Co.*, 49 Barb. 441; *Brett v. Carter*, 2 Low. 458; 3 Cent. L. J. 286; *Morrill v. Noyes*, 3 Am. Law Reg., N. S., 18; 56 Me. 458, 96 Am. Dec. 486; and in England, in *Langton v. Horton*, 1 Hare, 549; *Holroyd v. Marshall*, 9 Jur., N. S., 213; *Whitworth v. Gaugain*, ⁴⁸⁵ 3 Hare, 416; *Douglass v. Russell*, 1 Mylne & K. 488. The opinion of the court in *Morrill v. Noyes*, 56 Me. 458, delivered by Davis, J., is an able review of the authorities, and states the doctrine more clearly and precisely than any other case to which our attention has been called. It does not recognize the validity of mortgages of mere contingencies, or sales or mortgages of property which 'the mortgagors might purchase if they should purchase any.' but the sale or mortgage must relate to property then in contemplation of the parties to be purchased or acquired by the vendor or mortgagor." In line with the adjudicated cases in the class led by *Mitchell v. Winslow*, 2 Story, 680, the supreme court of Missouri held the provisions of the lease operated to create a lien for the entire rent and not for installments as they fell due monthly, and gave that lien a precedence over the chattel mortgage made on the personal property after it had been placed in the hotel building.

By the above quotation having pointed out the conflict which exists, it remains now to indicate the group in which this court, by its opinions, has placed itself. In *Lanphere v. Lowe*, 3 Neb. 131, the judgment under consideration had been rendered by the district court over which Chief Justice Lake was presiding. The opinion in this court was therefore expressed by but two judges, for whom Gantt, J., said: "Can a valid charge be made upon a thing not in existence? I think it cannot. It is a very ancient rule of law that a man cannot grant or charge that which he has not; and in *Jones v. Richardson*, 10 Met. 488, it is said that this 'is a maxim of law too plain to need illustration and which is fully supported by all the authorities': 4 Bacon's Abridgment, 514, Grants, D, 2; *Codman v. Freeman*, 3 Cush. 309; 2 Kent's Commentaries, 703; *Head v. Goodwin*, 37 Me. 187; *Robinson v. Macdonnell*, 5 Maule & S. 228; *Chynoweth v. Tenney*, 10 Wis. 400. This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee; it is equally applied ⁴⁸⁶ to sales of personal property and rights of property: *Chesley v. Josselyn*, 7 Gray, 490; *Rice v. Stone*, 1 Allen, 569."

In *Cole v. Kerr*, 19 Neb. 553, it was held that a mortgage executed, delivered, and properly recorded March 30, 1882, purporting to convey "40 acres of wheat, 30 acres of oats, now growing, 75 acres of corn, to be planted, and 50 acres of broom-corn, to be planted, tended, and delivered in Juniata," conveyed no title or lien upon the corn as against the levy of an execution of date November 25, 1882. The opinion of the court was delivered by Cobb, J., who said: "There is, to say the least of it, a great confusion of the authorities on the point being considered, but, after a careful examination of those cited on either side in this case, I have reached the conclusion that, as a question of law, the lien of a chattel mortgage of a crop of corn not planted at the time of its execution and delivery will not attach to the corn when it comes into existence until it is seized by the mortgagee, or until, in the language of a member of the court in the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, 'a new intervening act.' Until then it remains a mere license, and, until acted upon, it conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor. Presumptuous as it may seem to say so, I cannot agree to the proposition stated by Lord Hobart in the case cited by counsel for defendant in error, that the owner of the land, though he had not the future crop 'actually

in view nor certain, yet he had it potentially.' While it is true, as he adds, that 'the land is the mother and root of all fruits,' the word 'potentially,' as defined by Craig, means 'in possibility, not in act, not positively; in efficacy, not in actuality.' With this definition in view, it cannot be said that the mere ownership or possession of the soil carries with it the production of crops potentially. Soil alone does not produce crops of corn in this degenerate age, if it ever ⁴⁸⁷ did. It now requires, in addition to soil, seed and labor, both of man and beast, so that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach or come into efficacy without 'a new intervening act,' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed—something which I never heard contended for in this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us. The true distinction, I think, is that indicated in 1 Sheppard's Touchstone, 241, in the enumeration of things which pass by grant, to wit: 'Leases for years, be they present or future, wardships of tenants in capita, or by knight's service, trees, oxen, horses, plate, household stuff, and the like. Also trees, grass, and corn growing and standing upon the ground, fruit upon the trees, wool upon the sheep's back is grantable.' Doubtless the fruit on the trees, the grass in the meadow, and wool on the sheep's back may be granted without regard to the state of their growth or perfection, because in the due course of time nature, without the necessary assistance of new forces, will in the one case develop fruit, etc. But as we have already seen, the mere soil, except with the assistance of other elements and forces, in the latitude of Nebraska will not develop crops of corn."

In *Johnson v. Walker*, 23 Neb. 736, the case of *Cole v. Kerr*, 19 Neb. 555, was cited with approval as to the impossibility of mortgaging a crop of corn before it has been planted. In *Wagner v. Steffin*, 38 Neb. 392, there was under consideration the validity of a mortgage of date May 15, 1888, by the terms of which the mortgagee was to have a lien on all crops grown on certain premises. This mortgage was held valid, but there was no reference in the opinion to the actual or prospective condition of the corn when mortgaged, and in this respect we are not assisted by its date. The opinion was written by ⁴⁸⁸ Post, J., and, as he makes no mention of the crop not being planted, it could hardly have been mortgaged before it was in esse, for we find

that he, in *Steele v. Ashenfelter*, 40 Neb. 770, 42 Am. St. Rep. 694, delivered the opinion of this court in which the doctrine of *Cole v. Kerr*, 19 Neb. 553, was recognized and enforced as to personal property attempted to be mortgaged before possession of it had been acquired. Many of the cases attempt to make a distinction between legal and equitable rights under a mortgage of the nature of that just referred to, but this distinction was not recognized in *Steele v. Ashenfelter*, 40 Neb. 770, 42 Am. St. Rep. 694, which was an action by a receiver for the possession of property taken under an execution, and it was expressly held that the receiver had no rights which could be enforced by a court of equity.

From this review of cases it is clear that in this action the clause in the lease whereby there was attempted to be provided a lien to become operative against personal property afterward to be brought upon the premises, but which was not yet capable of description because not segregated from stocks of goods of which it was a part, was void as against the rights of appellants hereinbefore designated. As the rights of parties in this court cannot be determined upon the record as it stands, there will be no decree ordered or entered at this time, but the judgment of the district court will be reversed and the cause remanded for further proceedings.

LIENS—PRIORITY OF.—Where a lease of an unfinished hotel stipulating that the furniture should be bound for rent was signed before the hotel was furnished, but did not go into effect until furniture and fixtures were put in, it was held that a lien for rent attached on such furniture and fixtures, and had priority over a mortgage given after the lease took effect, but before rent was in arrears, to one knowing of the stipulation: *Wright v. Bircher*, 72 Mo. 179, 37 Am. Rep. 433.

PHENIX INSURANCE COMPANY v. HOLCOMBE.

[57 NEBRASKA, 622.]

INSURANCE. FIRE—PLEADING.—If a fire insurance policy contains a clause against other insurance without the written consent of the insurer, an answer, in an action on the policy, defectively alleging notice to the insurer that additional insurance has been obtained, must, after a trial on the merits, be liberally construed, so as to give effect to the evident intention of the pleader.

INSURANCE—KNOWLEDGE OF AGENT.—If an insurance agent has the supervision and inspection of the insurer's risks, the latter must be charged with knowledge of any fact learned by such agent while engaged in the performance of his duty as such inspector.

INSURANCE, FIRE—OTHER INSURANCE—WAIVER.—Failure of an insurer to cancel its policy after receiving notice of a breach of the condition against additional insurance is evidence from which a waiver of the right of forfeiture may be inferred, especially when an attempted cancellation of the policy is based upon another ground of forfeiture.

INSURANCE—ALIENATION—SALE TO PARTNER.—A sale of insured property by one partner to another is not within the meaning of an inhibition in the policy against a sale, transfer, or alienation of the insured property without the consent of the insurer.

INSURANCE, FIRE—NONOPERATION OF FACTORY—FORFEITURE.—If the things insured are exclusively personal property, such as machinery and merchandise, a claim of forfeiture cannot be based on the ground of nonoperation of the plant, when the policy provides that, if the property insured is a "manufacturing establishment," its nonoperation without the consent of the insurer shall avoid the policy.

TRIAL—EVIDENCE.—The decision of preliminary issues touching the competency of witnesses or admissibility of evidence is for the trial judge, and not for the jury, and, if proffered evidence is *prima facie* admissible, it is the duty of the court to receive it, otherwise to reject it.

Greene & Breckenridge and E. A. Cook, for the plaintiff in error.

Warrington & Stewart, for the defendant in error.

⁶²⁵ SULLIVAN, J. January 18, 1893, the Phenix Insurance Company issued to the Gothenburg Overall & Shirt Factory a policy of insurance in the sum of fifteen hundred dollars. Of this amount seven hundred and fifty dollars was upon electric motors, sewing machines, and other implements used in the factory, and seven hundred and fifty dollars on merchandise, consisting of raw materials and manufactured articles. When the policy was issued, the concern insured was a partnership composed of Holcombe, Reynolds, and Beyers. Reynolds was also defendant's local agent and transacted its ordinary business at Gothenburg. In July, 1893, Holcombe bought Reynolds' interest in the business, and in August of the same year he purchased ⁶²⁶ the interest of Beyers, and thus became sole owner of the insured property. January 14, 1894, the property was wholly destroyed by fire, and Holcombe thereupon brought this action in the district court of Dawson county to recover upon the policy. A trial to a jury resulted adversely to the company, and by this proceeding in error it seeks to reverse the judgment rendered against it on the verdict.

The policy contained the following provision: "If the assured shall have, or shall hereafter make, any other contract of insurance (whether valid or not) on the property herein de-

scribed, or any part thereof, without written notice to and without the consent of this company written hereon, . . . this policy shall be void." The defendant claims that there was a breach of this condition, and that the policy was thereby invalidated. The plaintiff concedes that additional insurance was procured of the Aetna Insurance Company, but insists that the right to a forfeiture, by reason of that fact, was waived by the defendant. The reply alleges that Hopkins, an agent of the company, charged with the supervision of its business in this state, was in Gothenburg at or about the time the additional insurance was obtained, and, being "informed of the desire of the plaintiff, and his intention, to take such additional insurance, . . . made a personal investigation of the facts and conditions pertaining to the said property, and, after having so investigated the same, gave his consent and approval to the taking of the said additional insurance." The defendant claims that this allegation does not amount to an averment that it was notified of the additional insurance after such insurance was procured, and cites *Eagle etc. Ins. Co. v. Globe etc. Co.*, 44 Neb. 380, where it was held that notice to an agent of an intention on the part of the insured to take out other insurance is not notice to the principal that further indemnity has been obtained. Had the pleading been assailed before trial, we would not hesitate to hold it insufficient; ⁶²⁷ but a trial having been had and proof having been made, under the issues joined, that Hopkins was informed of the existence of the Aetna policy, and not merely of the plaintiff's intention to procure it, we feel bound to sustain the reply by interpreting it according to the evident intention of the pleader. The company, having committed to Hopkins the supervision of its risks in Gothenburg, was charged with notice of any fact affecting the risk which came to his knowledge while engaged in the performance of his duty as an inspector: *Eagle Fire Ins. Co. v. Globe etc. Co.*, 44 Neb. 380. In the case just cited it was held, under a policy containing a forfeiture clause like the one here in question: "1. That the provision in the insurance policy prohibiting additional insurance on the insured property was inserted therein for the benefit of, and might be waived by, the insurer; 2. That the violation of the policy by the insured in procuring additional insurance on the insured property, without the knowledge or consent of the first insurer, did not render the policy issued by it void, but voidable only, at the election of such first insurer." In *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395,

it was held that "notice to an agent of an insurer that the insured had taken out additional insurance on the insured property is notice to such agent's principal." It was also held in the same case that the failure of an insurer to cancel its policy, after receiving notice of a breach of the condition against additional insurance, is evidence from which a waiver of the right of forfeiture may be inferred. On the authority of these cases, due notice being established, a waiver was the only inference properly to be deduced from the conceded fact that the defendant, more than ten months after being advised of the additional insurance, made an attempt to cancel its policy, based exclusively on the fact that the factory was not in operation.

One of the conditions of the policy is as follows: "If the property be sold or transferred (in whole or in part), . . . or any change takes place in title or possession ⁶²⁸ (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance; or if the title or possession shall be changed from any cause whatsoever, . . . without written notice to, and the consent of, the company indorsed herein, this policy shall in each and every instance be void." Under this provision it is claimed that the sale by Reynolds and Beyers to the plaintiff voided the policy. The argument is, that the contract of insurance, being purely a personal one, is broken whenever there is a change in the ownership of the insured property. The question is a vexed one. The adjudged cases are in direct conflict, but undoubtedly the decided numerical preponderance is against the proposition that a sale by one partner to another is within the meaning of an inhibition against a sale, transfer, or alienation of the insured property. The precise question has not been heretofore presented to this court for decision, and in disposing of it we feel at liberty to adopt the rule which will be in harmony with, and follow the trend of, our former adjudications. Heretofore, in actions on policies of insurance, while diligently endeavoring, in every case, to seek out and give effect to the true intention of the parties as expressed in their contract, we have, in construing clauses providing for forfeitures, been disposed to lean somewhat in favor of the insured and resolve questions of doubt and uncertainty against the insurer. So in this case, the proper interpretation of the clause under consideration being a matter of grave doubt, as shown by the diversity of judicial opinion in other jurisdictions, we have determined to adopt the view which will

avoid a forfeiture, and secure to the plaintiff the indemnity for which he contracted. In some cases it has been held that an inhibition against a change of title, interest, or possession would invalidate the policy, although a clause forbidding a sale or alienation might not have that effect: *Hathaway v. State Ins. Co.*, 64 Iowa, 229, 52 Am. Rep. 438; *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 629 267, 50 Am. St. Rep. 405. But a contrary conclusion was reached in *Burnett v. Eufaula Ins. Co.*, 46 Ala. 11, 7 Am. Rep. 581, and in *New Orleans Ins. Co. v. Holberg*, 64 Miss. 51. In the latter case it was said that the provision in question was inserted for the protection of the insurer against the risk of having strangers substituted for the party with whom the contract was made, and was designed only to interdict a sale by a party who was insured to a party who was not insured. The same conclusion was reached in *Virginia Fire etc. Ins. Co. v. Vaughan*, 88 Va. 832, under a clause in the policy forbidding any change "in the title or interest of the assured." "The object of such a provision," said Lewis, P., speaking for the court, "is to protect the insurers against the risk of the introduction of a stranger to the contract, perhaps not in any way known to them, or, if known, not deemed worthy of their confidence. But this reason cannot apply where there is simply a transfer of interest by one partner to another." In *Powers v. Guardian Fire Ins. Co.*, 136 Mass. 108, 49 Am. Rep. 20, the reason for the rule is stated to be "that partners, jointly contracted with as such, are to be regarded as so far only one person, and the condition as so far limited to keeping the ownership of the thing insured in some member of the insured body that changes between themselves in the relative amounts, or in the nature of their respective interests, do not fall within the fair meaning of the words used." In the case of *Drennen v. London Assur. Corp.* (cited in 49 Am. Rep. 24), Miller, J., charging the jury in the United States circuit court (District of Minnesota), used the following pertinent language: "Many changes may take place in the title, and also in the possession, without a sale or transfer of the property to another party; for instance, a sale by one partner to another has been held by the courts not to be such a sale or transfer as is included in this policy, and for the very obvious reason that the possession does not change. . . . The sale or the transmutation of the various interests between the partners 630 themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy." Other cases sustaining the view

that a provision against a change of title does not apply to sales between partners are *Pierce v. Nashua etc. Ins. Co.*, 50 N. H. 297, 9 Am. Rep. 235, and *Lockwood v. Middlesex etc. Co.*, 47 Conn. 553. Without further reviewing the authorities upon this question, our conclusion is that the policy in suit was not invalidated by the sale of the interest of Reynolds and Beyers to Holcombe.

This further condition appears in the policy: "Or if it be a manufacturing establishment, running wholly or in part over-time, or running at night, or if it shall cease to be operated from any cause whatever, except during the night-time, Sundays, and legal holidays, without said written notice to and without special agreement indorsed on this policy, then, and in every such case, this policy shall be void." It was alleged in the answer and proven on the trial that the factory referred to in the policy was not operated more than one day in each month after August 4, 1893, and by reason of this fact it is claimed the policy became null and void. We do not think it did. The insured property was not a manufacturing establishment, and the provision quoted is without force or relevancy. If the thing insured was a manufactory, and the machinery described in the policy was used in connection with the operation of the establishment, the defendant's argument would be unanswerable. But the things insured being exclusively personal property—machinery and merchandise—it needs no citations of cases to show that the claim for a forfeiture on the ground of nonoperation of the plant is entirely baseless. However, we refer to a case decided by the New York court of appeals, *Halpin v. Insurance Co. of North America*, 120 N. Y. 73, as a direct authority for the conclusion reached upon this point. In that case a policy on mill machinery and apparatus, apart from the building in which it was contained, provided that "if a building covered by this policy shall become vacant⁶³¹ or unoccupied, or if a mill or manufactory shall stand idle, . . . without notice to, and consent of, the company clearly stated herein, all liability hereunder will thereupon cease." It was held that the machinery did not constitute a mill within the meaning of the provision quoted. Vann, J., delivering the opinion, said: "It would not be a natural or ordinary use of language to describe machinery used in milling as a mill, or in manufacturing, as a manufactory." He also remarked that "forfeitures are not favored, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or

words contained in his own contract, to deprive the other party of the benefit of the right to indemnity for which he contracted."

To prove the value of the property destroyed by the fire, the defendant, on the trial, offered in evidence an affidavit made by plaintiff, and used in the adjustment of his claim against the Aetna Insurance Company. This offer was refused on the ground that the value fixed in the affidavit—being one thousand dollars—was a compromise valuation made, without prejudice, pending negotiations for the settlement of a disputed claim. Upon this ruling error is assigned. It is a conceded rule of procedure that the decision of preliminary issues of fact touching competency of witnesses, or admissibility of evidence, is within the province of the trial judge, and does not belong to the jury. If proffered evidence is *prima facie* admissible, it is the duty of the court to receive it; otherwise it should be rejected. In this case the defendant was not content with proving the signature of the plaintiff as a basis for the introduction of the affidavit in evidence. It went further, and brought before the court conflicting testimony bearing upon the competency of the document. It thus needlessly presented to the trial judge an issue of fact involving the veracity of witnesses; and we are not prepared to say that the finding of the judge in regard to the competency of the affidavit is unsupported by sufficient evidence.

⁶³² A final ground upon which defendant asks for a reversal of the judgment is that the verdict is not warranted by the evidence. We have carefully considered the evidence and think it sufficient. The judgment is affirmed.

INSURANCE, FIRE—CONDITION AGAINST ALIENATION.—A condition in an insurance policy against the sale or transfer of the insured property is not broken by the sale of part of the interest of the insured, as where he takes a partner, and the insured property becomes vested in the partnership, nor by a sale by a retiring partner to his copartners, who continue the partnership business: *Blackwell v. Insurance Co.*, 48 Ohio St. 533, 29 Am. St. Rep. 574, and note.

INSURANCE—KNOWLEDGE OF AGENT.—Knowledge of a local insurance agent is the knowledge of his company. So notice to an agent of facts avoiding a policy may, if not taken advantage of and acted upon, raise a waiver on the part of the company to insist upon the conditions of forfeiture violated: *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717, and note. Notice to or knowledge of the general agent of an insurance company is imputed to the company: *Schaeffer v. Farmers' etc. Ins. Co.*, 80 Md. 563, 45 Am. St. Rep. 361, and note. Compare note to *Kahn v. Traders' Ins. Co.*, 62 Am. St. Rep. 82, 83.

INSURANCE—ADDITIONAL INSURANCE—WAIVER.—Procuring additional insurance in violation of the conditions of the first

policy without the consent of the insurer, avoids the policy, unless the company has waived the right to insist upon such forfeiture. Waiver of a forfeiture, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel, and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture: *Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51.

PLEADINGS.—AN ANSWER will be liberally construed after verdict: *Beels v. Flynn*, 28 Neb. 575, 26 Am. St. Rep. 351.

TRIAL.—THE COMPETENCY OF EVIDENCE and of witnesses is a question for the court: *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Dickson v. Waldron*, 135 Ind. 507, 41 Am. St. Rep. 440.

BRISTOL SAVINGS BANK v. FIELD.

[57 NEBRASKA, 670.]

EXECUTIONS AND ORDERS OF SALE.—JUDGMENTS DIRECTING SALE OF LAND by a sheriff need not be supplemented by a formal order of the clerk of court in order to give force and effect to such judgments.

B. O. Hostetler, for the appellants.

Dryden & Main, for the respondents.

670 RYAN, C. This is an appeal from an order of confirmation of a sale made under the authority of a decree of foreclosure entered by the district court of Buffalo county. In this decree there were directions with respect to the enforcement of its provisions as follows: "That said premises be sold, and an order of sale shall be issued to the sheriff of Buffalo county, Nebraska, commanding him to sell the above-described premises as upon execution," and "that he shall execute to the purchaser of said real estate ⁶⁷¹ a good and sufficient deed of conveyance therefor and put such purchaser in the actual possession of said premises." It is urged, in argument, that the above-quoted language required that an order of sale issue to authorize the sheriff to act, and that, without a formal order of the character indicated, the sheriff was without authority to sell. The sheriff had a certified copy of the decree upon which he relied as his authority to make the sale, and in this we think he was clearly justified. In *McKinley-Lanning Loan etc. Co. v. Hamer*, 52 Neb. 709, it was pointed out that the issuance by the clerk of a formal order to supplement the provisions of the decree was entirely unnecessary. The sheriff was acting in this matter merely as the agency of the court, and this

agency would not have been strengthened, or better evidenced, if the clerk, as such, had directed the sheriff to carry out the decree directing a sale.

The judgment of the district court is affirmed.

JUDICIAL SALES—VALIDITY OF.—Judicial and execution sales are not scrutinized by the courts with a view to defeat them; on the contrary, every reasonable intentment will be made in their favor so as to secure the object they were intended to accomplish: *Smith v. Crosby*, 86 Tex. 15, 40 Am. St. Rep. 818. Courts go very far in upholding titles of purchasers under judicial sales: *Wilson v. Miller*, 30 Md. 82, 96 Am. Dec. 568.

BAILEY v. STATE.

[57 NEBRASKA, 706.]

RAPE—UNCHASTITY—CONSTRUCTION OF STATUTE.—

Under a statute providing that "if any male person of the age of eighteen years or upward shall carnally know or abuse any female child under the age of eighteen years with her consent, unless such female child is over fifteen years of age, and previously unchaste, he shall be deemed guilty of rape," a woman not "previously unchaste" is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the accused stands charged, and a woman who is over fifteen years of age and has had previous unlawful sexual intercourse with the same man is not within the meaning of the statute.

RAPE—UNCHASTITY—CONSTRUCTION OF STATUTE—INTERCOURSE IN ANOTHER STATE.—Under a statute providing that "if any male person of the age of eighteen years or upward shall carnally know or abuse any female child under the age of eighteen years with her consent, unless such female child is over fifteen years of age, and previously unchaste, he shall be deemed guilty of rape," an accused person cannot be convicted under evidence showing that the female, after she was fifteen years of age, and, previously to the act charged, had had illicit sexual intercourse for the first time with the accused in another state.

RAPE—INDICTMENT—STATUTE OF LIMITATIONS.—In a prosecution for rape against a person for having had sexual intercourse with a female over fifteen and under eighteen years of age not previously unchaste, and with her consent, as provided by statute, the indictment may include all acts of unlawful sexual intercourse occurring between the accused and the prosecutrix in the state after she became fifteen years of age, and which are not barred by the statute of limitations.

CRIMINAL LAW—ESTOPPEL.—The prosecution, in a criminal case, cannot invoke against the accused the doctrine of estoppel.

CRIMINAL LAW—VIOLATION OF STATUTE—EVIDENCE. To sustain a conviction, it is not only necessary for the prosecution to show that the accused has violated the spirit of the statute, but it must also show beyond a reasonable doubt that he has offended against the very spirit of the law.

Macfarland & Altschuler, for the plaintiff in error.

C. J. Smyth, attorney general, and W. D. Oldham, deputy attorney general, for the state.

⁷⁰⁷ RAGAN, C. Section 12 of chapter 4 of the Criminal Code of this state, among other things, provides: "If any male person, of the age of eighteen years or upward, shall carnally know or abuse any female child under the age of eighteen years with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, every such person so offending shall be deemed guilty of rape." George C. Bailey was indicted in the district court of Douglas county, under the statute just quoted, for having on June 13, 1898, had sexual intercourse with one Clara Blue with her consent, she then and there being a female of the age of sixteen years and not previously unchaste. Bailey was convicted and sentenced to the penitentiary, and brings that judgment here for review on error. Of the numerous assignments of error argued in the brief it would subserve no useful purpose to notice but two.

1. The evidence in the bill of exceptions shows, without contradiction, that in June, 1898, Clara Blue was between sixteen and seventeen years of age; that no man had ever had sexual intercourse with her except the prisoner; that in March of that year she lived in the state of Iowa; that the prisoner formed her acquaintance at a hotel in Pacific Junction, in that state, in the month of March, 1898; that with her consent he then had sexual ⁷⁰⁸ intercourse with her in Iowa; that subsequently, in June of said year, she came to the city of Omaha, in this state, and on the 13th of said month, and at divers other times before and after that date, he again had sexual intercourse with her in this state, she consenting thereto. As to the meaning of the phrase "previously unchaste," found in the statute just quoted, the district court instructed the jury as follows: "By the phrase 'unchaste,' as used in the law defining rape, is meant, lewd; having an indulgence of lust; and, as applied to a female child previously unchaste, means that she was previously, before the act complained of, lewd, or had an indulgence for lust." The prisoner took an exception to the giving of this instruction. We do not approve of the construction placed upon the phrase in the statute as embodied in this instruction. The definition of an unchaste woman, within the meaning of the statute, is by the district court given as a lewd woman—a woman possessing an indulgence for lust; or, as we understand the court's defini-

tion, a woman, to be unchaste, within the meaning of this statute, must be of notorious lewd and lascivious habits; in the ordinary language of the day, she must be a "prostitute." We do not think this is the meaning of the statute. A woman not "previously unchaste," within the meaning of the statute, is one who has never had unlawful sexual intercourse with a male prior to the act of intercourse for which the prisoner stands indicted. The object of the statute quoted was to protect the virtuous maidens of the commonwealth—in other words, to protect those girls who were undefiled virgins; and a female under eighteen years of age and over fifteen years of age who has been guilty of unlawful sexual intercourse with a male is not within the act.

2. But the evidence in this record does not sustain the verdict on which the judgment rests. The material allegations of the indictment are: That the prisoner was a man over eighteen years of age; that in Douglas county, Nebraska, with her consent, he had sexual intercourse ⁷⁰⁰ with Clara Blue; that she was then and there sixteen years of age, and not "previously unchaste." The latter averment was not only not proved by the state, but the undisputed evidence shows that Clara Blue, prior to the date of her intercourse with the prisoner in Nebraska, was unchaste. The fact that she was first deprived of her virginity by the prisoner does not strengthen the state's case. That first illicit sexual act of the female and prisoner occurred in the state of Iowa. Had the first defilement of the girl by the prisoner occurred in Nebraska instead of Iowa on the date it did, and which was prior to the one charged in the indictment, then the first defilement would be no defense to the prisoner on an indictment for the second, since both would have been within the statute of limitations and each intercourse a part of the crime charged in the indictment. But to sustain this conviction on this evidence is to punish the prisoner here for the crime committed in another jurisdiction. The statute is a harsh one and the penalties for its violation severe. To sustain a conviction under it the evidence must show beyond a reasonable doubt, among other things, that the female with whom the sexual intercourse was had was, prior to that intercourse, sexually pure—chaste as Diana. To show that she was chaste prior to the sexual act in Nebraska but for her previous seduction by the prisoner in another state does not satisfy the statute. Suppose the statute of limitations for this crime was one year instead of three; suppose the prisoner in Nebraska deprived this girl of

her virginity when she was sixteen and she did not again carnally know any man until she was seventeen and a half, and then, with her consent, sexual intercourse occurred between herself and the prisoner and he is indicted therefor. Is it not clear that the intercourse which occurred when she was sixteen would, if established, afford the prisoner a complete defense? It would, because after the second sexual act she was not chaste. The first illicit intercourse would not be included in and ⁷¹⁰ a part of the crime charged in the indictment; that act would be barred by the statute of limitations. The statute does not punish men for unlawful sexual relations with a prostitute over fifteen years of age, nor for such relations with a female who, though not a prostitute, has already submitted herself to the illicit embraces of a male capable of performing the copulative act.

3. But it is said by counsel for the state that to allow the prisoner to urge as a defense here the intercourse which took place between himself and the prosecutrix in the state of Iowa would be permitting the accused to take advantage of his own wrong. This is simply saying that the accused is estopped from asserting the truth of his unlawful conduct in another jurisdiction, because that conduct would establish his innocence of the crime with which he is charged with having committed in this state. But the state, in criminal prosecutions, may not invoke against the prisoner the doctrine of estoppel: *Moore v. State*, 53 Neb. 831. To sustain a criminal conviction it is not enough for the state to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law: *Moore v. State*, 53 Neb. 831; *Crim. Code*, sec. 251. Here the prisoner is charged with having had in this state sexual intercourse, with her consent, with a girl sixteen years of age, she being prior thereto chaste. At the time the intercourse occurred in this state the female was not chaste. Prior to the prisoner's intercourse with her in Iowa, so far as this record shows, she was chaste, and in Iowa—for we must presume the laws of that state to be the same as ours—he robbed her of her virginity and committed the crime for which he is convicted here.

The judgment of the district court is reversed.

PENAL STATUTES MUST BE STRICTLY CONSTRUED against an offender and liberally in his favor; it is not sufficient that the offense is within the mischiefs intended by the legislature to be redressed, if not within the words used: *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100. The question whether certain conduct is made

a crime by statute must be determined by its language. Constructive crimes are repugnant to the letter and spirit of criminal law: *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257. Penal statutes cannot be extended to cases not clearly covered thereby: *People v. Nelson*, 153 N. Y. 90, 60 Am. St. Rep. 592.

SEDUCTION.—A FEMALE IS NOT OF CHASTE CHARACTER who has voluntarily submitted to sexual intercourse, though before attaining the age of consent, if her age was such that she might have made a valid contract of marriage: *People v. Nelson*, 153 N. Y. 90, 60 Am. St. Rep. 592.

RAPE—UNCHASTITY.—On the subject in general, see the monographic note to *Smith v. State*, 80 Am. Dec. 368, 369.

HANSCOM v. MEYER.

[57 NEBRASKA, 786.]

APPELLATE PRACTICE.—MATTERS NOT CONTAINED in the record and not disclosed thereby cannot be considered on appeal.

MORTGAGES—FORECLOSURE—MANNER OF SALE.—If land has been mortgaged as one tract and subsequently platted or cut up into city lots, and some of the lots sold, the mortgagor cannot, in case of foreclosure, insist, as a matter of right, that the sale be of the lots as platted, and not of the entire tract.

J. H. McIntosh, C. S. Elgutter, L. E. Crofoot, and C. Ogden, for the appellants.

G. E. Pritchett, for the respondents.

787 HARRISON, C. J. On May 15, 1886, the appellants herein purchased of, and there was conveyed to them by, Andrew J. Hanscom, the appellee, eighty acres of land near the city of Omaha, probably about three and one-half miles distant from the then center of the city. A more particular description of the land is as follows: The southeast quarter of the northeast quarter of section 31, and the southwest quarter of the northwest quarter of section 32, in township 15 north, of range 13 east of the sixth principal meridian. The agreed consideration to be paid for the property was forty thousand dollars, of which there was a payment at the time of two thousand five hundred dollars. The balance was divided into ten portions, to be paid at stated times, and to evidence the promises of these deferred payments promissory notes were executed, and as security a mortgage on the land purchased was executed and delivered to appellee, in which appeared the statement that it was given to secure the payment of a **788** part of the purchase

price of the property described in it. As soon as in the regular course of such matters it could be done, the land was platted as and for an addition to the city of Omaha and named "Manhattan Addition," and sales of lots therein were made to quite a number of persons, to whom warranty deeds or contracts, as the transactions required, were executed and delivered evidencing the purchases. Some of the deferred payments of the purchase price of the land secured by the mortgage were paid, but there were defaults in the further provided payments, and this, an action to foreclose the mortgage, was instituted. The appellants, in the pleadings filed, admitted the execution of the notes and mortgage; stated the purchase of the land; that the appellee then knew the purpose of appellants with which they purchased, viz., to plat it and make of it an addition to the city of Omaha; that he advised them in regard to the manners of procedure, and suggested the name which was given the addition; also, that there was an oral agreement at the time, and which in part moved them to the purchase, that when they effected sales of lots and paid to appellee certain sums, designated portions of the amounts realized from sales of lots, he would release from the lien of his mortgage such lots. The appellants asked that if a foreclosure of the mortgage was decreed, the sale, if any, under it should not be of the land as described in the mortgage in one tract, but that the plat of the addition be accorded recognition; also, the sales by appellants of lots in said addition, and the sale to satisfy the mortgage, be of the divisions of the land as established by the plat and in the inverse order of the alienation by the mortgagors. On hearing, the trial court denied the prayer of the appellants, and sale of the land was ordered accordant with its description in the mortgage.

There are some arguments presented for appellants to establish that appellees' acts in regard to the addition amounted in law to a dedication, or joining in the dedication, ⁷⁸⁹ of portions of the plat and estopped him from enforcing his mortgage by sale of the land in any other manner than in parcels or lots shown by the plat; and further, that the findings and decree of the district court were not sustained by the evidence. The force of these arguments is destroyed by the findings of the district court that the plat was made without the consent, knowledge, or agreement of appellee; and further, that he never made any agreement to release any portion of the land, and further fact that though the evidence relative to the points of litigation to which we have just referred was, in the

main, directly conflicting, the findings had support in it and were not clearly wrong; all of which being true, the findings must be allowed to stand.

It is said by way of argument that the court did not consider some of the evidence, and for this reason reached the conclusion it did. This cannot be considered, because the record does not disclose it, and we must be governed by what appears in that document.

The main contention for appellants is of the denial of a direction in the decree that the sale be made of the land as platted and according to the inverse order of alienation or conveyances of lots by the mortgagors. The rule of liability or sale in the inverse order of alienation of mortgaged premises, where there have been subsequent conveyances of portions of property mortgaged in gross, has been very generally recognized and established: See 2 Pingrey on Mortgages, sec. 1922, and cases cited in note. See, also, 2 Jones on Mortgages, sec. 1621, and collection of cases in note 2. It has been approved and announced by this court: *Lausman v. Drahos*, 8 Neb. 457. The doctrine is generally invoked and enforced by and for the subsequent purchasers of parts of mortgaged property or subsequent encumbrancers of portions thereof. In this action its aid is asked in favor of the mortgagors. Whether they may call for its interposition and there be a compliance with the demand as a matter of right, as we view the conditions as disclosed herein, we ⁷⁹⁰ need not determine. It has been determined that where land has been mortgaged as one tract and subsequently platted or cut up into lots, and some of the lots sold, the mortgagor may not, in event of a foreclosure, insist as a matter of right that the sale be of the lots and not of the whole tract: *Wiltsie on Mortgage Foreclosure*, sec. 492; *Griswold v. Fowler*, 24 Barb. 135; *Hubbell v. Sibley*, 5 Lans. 51; *Paquin v. Braley*, 10 Minn. 304; *Durm v. Fish*, 46 Mich. 312. There was nothing in this case to appeal to a court of equity to vary, at the instance of the mortgagors, the regular course of a foreclosure of the mortgage on the entire tract and order the sale by the lots as described in the plat. From the evidence it cannot be said that the land was of the value equal to the amount due on the mortgage debt. It may be argued, as it is in the briefs, that it probably might sell for more as city lots than it would as an individual tract, but with equal force, so far as the evidence shows it, the contrary may be asserted. In view of all the evidence we cannot say that the trial court was not fully

warranted in decreeing that the sale be of the whole tract. We certainly cannot say that the decree was wrong in this particular.

The decree of the district court must be affirmed.

APPEAL—MATTERS NOT IN RECORD.—The appellate court will not entertain exceptions which are not assigned below, or do not appear in the record proper; and errors for which a judgment is sought to be reversed must affirmatively appear in the record: Note to *Mercer v. Corbin*, 10 Am. St. Rep. 82.

MORTGAGES.—A FORECLOSURE SALE is not invalid because the premises were not sold in parcels according to subdivisions made after the execution of the mortgage: *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

McDONALD v. METROPOLITAN LIFE INSURANCE Co.

[68 NEW HAMPSHIRE, 4.]

INSURANCE—UNAUTHORIZED ACTS OF AGENT—RATIFICATION—REPUDIATION.—If an insurance company ratifies unauthorized acts of its agent, by issuing a policy, it is chargeable with his knowledge of material facts, and is bound to repudiate such acts in toto, or not at all. It cannot accept premiums and yet deny liability on the ground that its agent deceived the insurer as well as the insured in taking the application.

INSURANCE—REMEDY WHERE BOTH INSURER AND INSURED ARE DECEIVED BY AGENT.—When both parties to a contract of insurance act in good faith, but are alike deceived by reason of false representations of material facts, such as those concerning the plaintiff's business, made unwittingly on the applicant's part, but with full knowledge of the company's agent, the insured should, in an action for money had and received, be allowed to recover the premiums paid, less the value of the insurance enjoyed by him during the existence of the policy.

ASSUMPSIT.—AN ACTION FOR MONEY HAD AND RECEIVED is an equitable action and may, in general, be maintained whenever the defendant has money belonging to the plaintiff which, in equity and good conscience, he ought to refund to him.

INSURANCE BY HUSBAND FOR WIFE'S BENEFIT—ACTION—PROPER PARTY PLAINTIFF.—The fact that a policy of insurance is for the benefit of the wife of the insured does not make her the insured. She has an equitable interest in the policy, but her husband is the proper party plaintiff in an action at law to recover premiums paid by him upon the policy.

Assumpsit to recover premiums paid by plaintiff on a policy of insurance on his life, payable to his wife. An application and a medical examination had been signed by the plaintiff, each of which stated the plaintiff's occupation to be that of "laborer," that he was not connected in any way with the ale,

wine, or liquor business. He had declared and warranted in his application that the representations and answers made therein, as well as in the medical examination, were strictly correct and wholly true; that they should form the basis and become part of the contract of insurance; and that any untrue answers would render the policy null and void. It provided that the application should be a part of the contract, and was made subject to certain conditions. One was that the person insured should not be connected, in any capacity, with the ale, wine, or liquor business, unless so specified in the application, or unless the company's permission should be indorsed on the policy. Another condition prohibited agents from making, altering, or discharging contracts or waiving forfeitures. It was further provided by another condition that, if any of the warranties referred to were not true, or if the conditions of the policy were not in all respects observed, the policy should thereupon become void, and that, whenever it should terminate, all premiums paid should be forfeited. The insured was a mason by trade, but, when not employed at his trade, sold ale, wine, and liquor, as well as groceries, at a small grocery store. A soliciting agent of the defendant company, who knew the plaintiff's business, took and wrote the application; and agents of the company, who collected premiums on the policy, also knew the plaintiff's business. It was also known to the company's assistant superintendent of agents for the district in which the plaintiff lived, whose powers were to act as soliciting agent, and to supervise the other soliciting agents of the district, for he was at the plaintiff's store at least twelve times during the continuance of the policy, for the purpose of inspecting the agent's work, and did not object to the business carried on there by the plaintiff. The defendant company had no knowledge that the plaintiff was engaged in the ale, wine, and liquor business, except as its agents knew of it, until the policy had been running nearly three years, when it offered to give him permission to engage in that business and to continue the policy, but upon the condition that its amount should be reduced, though without any change in the amount of the premiums. The plaintiff refused to accept the condition, and the company declared the policy forfeited and lapsed. Neither the application nor the policy was ever read by, or to, the plaintiff, and he did not know the contents of either. Neither did he know that the company objected to his business, until the offer above named was made, and he never made any effort to conceal his business.

Ernest L. Guptill, for the plaintiff.

Drummond & Drummond, of Maine, for the defendants.

⁵ **BLODGETT, J.** In receiving the application the agent clearly represented the defendants: *Eastman v. Provident etc. Assn.*, 65 N. H. 176, 23 Am. St. Rep. 29. Whether in filling it up, he technically represented them or the plaintiff is not important. In either case, the defendants cannot set up the false description of the risk against the plaintiff as a warranty. And the reason for this is, that it would be a fraud on their part to hold him to the truth of the representation which he did not in fact make, and of whose falsity they must be deemed to have had notice.

By issuing the policy the defendants ratified the agent's action in taking the application, and became chargeable with his knowledge of the plaintiff's business; and by receiving the subsequent premiums, collected by their agents with full knowledge of the business, they continued to be chargeable with such knowledge so long as they accepted the premiums. This estops them from taking to themselves the benefit of the false representation without responsibility for it. They cannot adopt that part of the agent's acts beneficial to them, and reject the the rest. "With the benefit they must accept the burden": *Eastman v. Provident etc. Assn.*, 65 N. H. 176, 23 Am. St. Rep. 29; *Rader v. Maddox*, 150 U. S. 128. They are ⁶ bound to repudiate the agent's acts in toto, or not at all. The contract must stand or fall as an entirety.

As a corollary from the preceding propositions, the termination of the contract by the defendants did not forfeit to them the premiums already paid upon it. But this is so for another reason, to which no exception can with fairness be taken. No fraud is imputable to the plaintiff. On the contrary, the facts show that both parties acted in good faith, and were alike deceived by the agent. By his fraudulent conduct the plaintiff was unwittingly placed in the position of making a false representation for the purpose of securing a valuable contract which, upon a truthful statement of his occupation, could not have been obtained; and by that representation the defendants were induced to consummate the contract, and subsequently to terminate it. "When both the insured and the insurer are deceived by fraudulent acts of an agent . . . if both parties acted bona fide the policy should be canceled and the premiums returned": *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519. In such a

case, the insurer cannot take advantage of a provision of the policy that "whenever, for any cause, this policy shall terminate, all premiums paid shall be forfeited to the company," because, in the language of Miller, J., in *Insurance Co. v. Wilkinson*, 13 Wall. 222, 233, it "would be an act of bad faith and of the grossest injustice and dishonesty": See, also, *McKee v. Phoenix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129, 130.

In the absence of any forfeiture, it is instinctively manifest that when such a contract is terminated by the insurer from a cause like the one disclosed by this case, the insured should have some compensation or return for the money already paid on the contract. He has an equitable, and in our opinion a legal, right to have this amount restored to him, subject to a deduction for the value of the insurance enjoyed by him during the existence of the policy; in other words, he is entitled to have the equitable value of his policy: *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 33, 34; and this he may recover in an action for money had and received, which is an equitable action and may, in general, be maintained whenever the defendant has money belonging to the plaintiff which in equity and good conscience he ought to refund to him.

The objection that the action should have been brought in the wife's name is of little practical consequence. If the objection is well taken, she may be substituted as plaintiff by amendment: *Boudreau v. Eastman*, 59 N. H. 467. An inspection of the policy, however, shows the plaintiff, and not his wife, to have been the party to the contract with the defendants. It was made upon his application; it was issued to him as the assured; the premiums were paid by him; and it was his interest in his own life that supported the policy. The fact that the policy was for the benefit of his wife did not make her the assured, but merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. As such, she had the equitable interest in the policy, but not the title to support an action at law upon it in her own name against the defendants, or for the recovery of the premiums paid by her husband: *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381, 389, 400, 401.

Case discharged.

All concurred.

INSURANCE—NOTICE TO AGENT—EFFECT OF.—Notice to an agent of facts material to the risk is notice to the insurer. Hence,

if an insurance agent, who writes the application and has full knowledge of the facts, writes incorrect answers, without the knowledge or consent of the insured, the company cannot avoid payment of a loss on account thereof. In other words, the fraud, misrepresentations, misstatements, or mistakes of the company's agent do not prejudice the assured in his right to recover upon a contract of insurance to which he innocently became a party: *Notes to Royal Neighbors etc. v. Boman*, 69 Am. St. Rep. 205; *Lumbermen's Mut. Ins. Co. v. Bell*, 57 Am. St. Rep. 144; *Marston v. Kennebec Mut. Life Ins. Co.*, 56 Am. St. Rep. 423; *Creed v. Sun Fire Office*, 46 Am. St. Rep. 137. An insurance company is charged with knowledge, when an application for insurance is taken by an agent of the company, and he is aware of the facts material to the risk, but which are not set forth in the application. Under such circumstances, an unintentional concealment or misrepresentation will not avoid the policy: *Campbell v. Merchants' etc. Fire Ins. Co.*, 37 N. H. 35, 72 Am. Dec. 324. Knowledge obtained by an inspecting agent of an insurance company upon an examination of the premises insured is imputable to the company: *People's Ins. Co. v. Spencer*, 53 Pa. St. 353, 91 Am. Dec. 217.

ASSUMPSIT—MONEY HAD AND RECEIVED.—An action for money had and received may be maintained by one person against another, when the latter has money to which, in equity and good conscience, the former is entitled: *Merchants' etc. Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586.

AETNA INSURANCE COMPANY v. THOMPSON.

[68 NEW HAMPSHIRE, 20.]

INSURANCE — MORTGAGED PROPERTY — INSURANCE MONEY—EQUITABLE LIEN.—If a mortgagor is bound by covenant, or otherwise, to insure the mortgaged premises for the security of the mortgagee, the latter has an equitable lien, to the extent of his interest in the property destroyed, upon the money due on a policy taken out by, and payable to, the mortgagor.

INSURANCE MONEY—ASSIGNEE'S RIGHT TO.—An assignee in insolvency stands in the same position as the insolvent debtor, and has no right to insurance money which could not be lawfully claimed by the latter.

INSURANCE — MORTGAGED PROPERTY — SUBROGATION.—If a mortgage is given to indemnify sureties, accompanied by the mortgagor's agreement to insure the mortgaged property for the benefit of such sureties, but he, disregarding the agreement, procures insurance in his own name, after which the property is destroyed, they, upon paying the debt for which they are sureties, become equitably entitled to the insurance, in preference to the mortgagor's assignee in insolvency.

Interpleader. W. L. Melcher and E. Tetley became sureties for J. J. Lane upon his note to the Laconia Savings Bank. He secured them by a mortgage upon personal property which he agreed to have insured, the policies to be made payable to the bank as security for the payment of the note. He immediately took out policies, but had them made payable to himself, with-

out any mention of the sureties or of the bank. The policies remained in force until the property was destroyed by fire on December 25, 1893. The sureties supposed that the insurance had been effected for their benefit, until after the fire, when they learned to the contrary. They afterward paid the amount of the note to the bank. Later, insolvency proceedings were commenced, and the defendant, Thompson, was appointed assignee. The plaintiffs adjusted the loss under their policy, and the amount due was claimed by the sureties and also by the assignee.

Napoleon J. Dyer, for the plaintiffs.

E. A. & C. B. Hibbard, for Melcher and Tetley.

Beckford & Shannon, for Thompson, the assignee.

21 WALLACE, J. If a mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor and payable to himself to the extent of the mortgagee's interest in the property destroyed: *Wheeler v. Insurance Co.*, 101 U. S. 439, 442; *Providence County Bank v. Benson*, 24 Pick. 204; *Stearns v. Insurance Co.*, 124 Mass. 61, 26 Am. Rep. 647; *Dunlop v. Avery*, 23 Hun, 509; *Cromwell v. Insurance Co.*, 44 N. Y. 42, 4 Am. Rep. 641; *Nichols v. Baxter*, 5 R. I. 491; *Miller v. Aldrich*, 31 Mich. 408.

Lane procured the insurance on the mortgaged property, and afterward kept it in force with intent to perform his agreement to insure for the benefit of the mortgagees; and although he neglected to have the policies made payable to the bank according to his agreement, yet the mortgagees, Melcher and Tetley, have an equitable lien on the policies to the extent of their interest against him.

The assignee in insolvency stands in the same position as Lane, the insolvent debtor. He is not by virtue of his office an attaching creditor, or subsequent purchaser. The estate of the insolvent debtor vests in him, not by virtue of an attachment or sale, but by force of the assignment under the statute, and he can take no more than the debtor had, except in case of a fraudulent sale: *Adams v. Lee*, 64 N. H. 421; *Shaw v. Glen*, 37 N. J. Eq. 32; *Wilson v. Esten*, 14 R. I. 621.

As the agreement provided that the insurance was to be made payable to the bank for the benefit of the mortgagees, and as they have paid the note and are equitably entitled to the benefit

of the insurance, they may be subrogated to the rights of the bank: *Philbrick v. Shaw*, 61 N. H. 356.

Decree for the mortgagees.

Smith, J., did not sit; the others concurred.

INSURANCE—RIGHTS OF MORTGAGEE—EQUITABLE LIEN. If a mortgagor has covenanted to keep mortgaged premises insured for the benefit of the mortgagee, and either has effected, or thereafter effects, insurance in his own name, though without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected under the agreement, and will give the mortgagee his equitable lien accordingly: *Nordyke etc. Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219. An action by a mortgagee may be maintained on a policy of insurance issued to, and in the name of, the mortgagor, providing that the loss shall be payable to the mortgagee as his interest may appear, where the amount of the debt secured by the mortgage exceeds the amount of the insurance and the whole value of the property: *Note to Peck v. Girard etc. Ins. Co.*, 67 Am. St. Rep. 602.

HOPKINS v. RAYS.

[68 NEW HAMPSHIRE, 164.]

ATTACHMENT—SUFFICIENCY OF DESCRIPTION.—For the purpose of attachment, a description of the property is sufficient if the officer, by the exercise of reasonable diligence, can find the property.

ATTACHMENT — LOGS — SUFFICIENCY OF DESCRIPTION.—If an officer is commanded by the precept of his writ to "attach all logs drawn" by the defendants, and "lying by" a certain railroad, in places specified, the description of the property is sufficiently definite to enable the officer to find and take possession of it, though it is found three or four rods from the track, where the particular logs to be attached are distinguishable from other logs there by certain marks upon them. Logs lying no farther than that from the track of a railroad may well be said to be "lying by the railroad."

LIENS—SUPPLIES AND LABOR—LOGGING OPERATIONS.—The lien of a person who performs labor and furnishes supplies in furtherance of a general lumbering operation of cutting and hauling logs is not limited to the particular logs drawn by his own team, but may be enforced against those cut in the general logging operations, and not drawn by him.

Assumpsit to enforce a lien for labor and supplies, furnished in cutting and hauling logs. At the time of the attachment, Whipple, one of the defendants, had purchased the logs, and claimed them subject to whatever lien the plaintiff had and that the plaintiff was not entitled to judgment in rem because the logs to be attached were not described with sufficient

certainty in the precept to the officer, and because the plaintiff had no lien on the logs attached for the sum of one hundred and eighty dollars, those logs not having been drawn by her. The court ordered judgment for the plaintiff in rem, and the defendants excepted.

Ladd & Fletcher, W. & H. Heywood, and Shurtleff & Sullivan, for the plaintiff.

Drew, Jordan & Buckley, for other creditors.

Alland G. Fay, for the claimant.

¹⁶⁴ SMITH, J. The precept in the writ commanded the officer to attach all the logs drawn by Rays, McPherson & Co., and lying by the Kilkenny Railroad in Lancaster, Kilkenny, or Northumberland. The officer's return shows an attachment of all hard-wood logs lying upon the pond, in and about the mill-yard of Whipple's (the claimant's) mill in Lancaster. The logs attached were lying on the mill-pond three or four rods from the railroad. At the time of the attachment they had been purchased by Whipple of the defendants, subject to whatever lien the plaintiff had.

¹⁶⁵ The description of the property was sufficiently definite to enable the officer to find and take possession of it. The property was logs. The particular logs were those drawn by the defendants, and were distinguishable from other logs there by certain marks upon them. The place or places where the logs might be found were the towns of Lancaster, Kilkenny, and Northumberland, and the particular locality in the towns was the Kilkenny Railroad, or, in the language of the precept, "lying by the Kilkenny Railroad." The logs were found on the ice in Whipple's mill-pond, on the line of the railroad and three or four rods from it. Logs lying no farther than that from the track of a railroad may well be said to be "lying by the railroad." They were doubtless lying as near the railroad as bulky articles of that nature could be safely or conveniently placed. No question as to their identity is raised. The fact that they had been drawn by the claimant some two miles from the place where the defendants delivered them to him, is of no importance, except so far as it might affect the ability of the officer to identify them. They were logs drawn by the defendants from the lot where the lumbering operations were carried on, although drawn the last two miles of their journey by Whipple.

In *Hill v. Callahan*, 58 N. H. 497, the precept to the officer

"to attach about seven hundred thousand feet of spruce logs and about twenty thousand feet of pine logs now landed on the land of John Head, in Shelburne, in said county of Coos, near and upon the bank of the Androscoggin river, and upon said river," was held sufficient and "quite as definite as the nature of the case would seem to permit." The description of the logs in this case was not less definite. It is insisted that the description should be so definite that the officer, without other direction, may identify the property. This cannot be literally correct. If the officer is a stranger, he may inquire where the locality named in the precept is; or, if the property is described as in the possession of A, he may inquire who A is; or, if in a building or on land of A, which building or what land is A's; or, if the property is described as logs drawn by B in the possession of A, and A has also logs drawn by C, he may inquire what logs were drawn by B.

One construction of the language of the precept may be, that the logs were drawn by the defendants to and left by the side of the railroad for shipment. But that is not the only construction. The language is broad enough to include logs drawn by the defendants, although not the whole distance from the lot, the destination of which was the Whipple sawmill, or other mills elsewhere on the line of the railroad. The description is sufficient, if the officer can find the property by the exercise of reasonable diligence.

¹⁶⁶ The plaintiff has a lien on the logs attached for the item of one hundred and eighty dollars. There would be great difficulty in coming to any other conclusion. Suppose ten men hauled logs for the same defendants and from the same lot, under separate contracts. It would be unreasonable to hold that each, when engaged in a common enterprise, must preserve the identity of the logs drawn by his own team. If it is not impossible to regulate their rights in any other way than by holding that each has a lien on all the logs drawn, a different rule would be so vexatious, expensive, and uncertain that it is safe to conclude that the legislature never intended such a result.

The logs attached were distinguishable by marks from other logs. The labor of the plaintiff's team was in furtherance of a general lumbering operation of cutting and hauling logs from the defendants' land. If a person's lien were limited to the particular logs drawn by his own team, the purpose of the statute would be defeated in many instances by the impracticability and impossibility of following the logs into the possession of

those to whom the owner might sell them, or from their becoming intermingled with logs drawn by others. The statute is to be reasonably construed to effectuate the intention of the legislature: *Bean v. Brown*, 54 N. H. 395, 397. This construction is consistent with the general purpose of the statute, which gives a lien, not only to those who cut the timber or haul the logs, but to him who furnishes supplies for the men and teams engaged in cutting and hauling, to the person who hauls the supplies, and to the cook in the camp: Pub. Stats., c. 141, sec. 12.

Exceptions overruled.

Wallace, J., did not sit; the others concurred.

LIENS — LUMBER — LOGS — INTERMINGLING.—If an owner negligently intermingles logs cut by different companies of workmen, so that the lots upon which the several laborers worked cannot be distinguished, the respective liens of the workmen will be upon the whole mass: *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621. A statutory lien on lumber, to laborers thereon, for the amount stipulated to be paid for their personal services, and actually due, will attach, it seems, to lumber labored upon by one in connection with other workmen, though it cannot be proved that he or the particular crew of workmen with which he worked labored on the identical lumber sought to be subjected to the lien: *McCrillis v. Wilson*, 34 Me. 286, 56 Am. Dec. 655.

COLBY v. McCLINTOCK.

[68 NEW HAMPSHIRE, 176.]

ACTIONS—NOTE AND MORTGAGE—CONCURRENT REMEDIES.—One who holds a note secured by mortgage has two separate and independent remedies which he may pursue successively or concurrently; one is on the note against the person and property of the debtor, and the other is by foreclosure to enforce the mortgage lien upon his real estate.

JUDGMENT—CONCURRENT REMEDIES—PAYMENT OR SATISFACTION.—When a note is secured by mortgage, and the mortgagee pursues his separate remedies on the note and on the mortgage concurrently, the judgment in each case must be for the full amount of the note, though one payment or satisfaction will discharge both proceedings; and a partial payment or satisfaction upon either will discharge both judgments to the extent of the payment.

Assumpsit, to recover the amount due upon certain promissory notes, secured by a mortgage on certain real estate, and upon which mortgage the plaintiff had obtained a conditional judgment at the same term of court. This judgment adjudged that the full amount due to the plaintiff was the full amount

of the notes, but the defendants claimed that the value of the land for the possession of which the conditional judgment was rendered should be deducted from the amount due upon the notes, and that judgment for the remainder only should be rendered in the action upon the notes. The court ruled otherwise, and a verdict for the full amount was filed. The defendants excepted to the verdict and moved to set it aside.

Perrin T. Kellogg, for the plaintiff.

Ladd & Fletcher, for the defendants.

177 WALLACE, J. The mortgagee has a remedy on his notes against the person and property of the debtor. He also has another separate and independent remedy on the mortgage, by foreclosure to enforce the lien upon the debtor's real estate, which by the mortgage he has charged with the payment of the debt represented by the notes. The mortgage may be discharged without releasing the mortgagor from his personal liability on the debt; and the personal liability on the debt may be terminated by a discharge in bankruptcy or insolvency of the mortgagor without extinguishing or discharging the mortgage. Neither is a judgment against the validity of the mortgage necessarily a bar to the suit on the notes; nor is a judgment against the right of the mortgagee to recover in a personal suit on the notes necessarily a bar to a suit of foreclosure. The mortgagee may pursue his remedies successively or concurrently: 2 Jones on Mortgages, secs. 1215, 1222; 4 Kent's Commentaries, 184; Burnell v. Martin, 2 Doug. 417; Ely v. Ely, 6 Gray, 439.

The amount of the judgment in the suit on the notes must be for the full amount of the mortgage debt, as the mortgagee may elect, and may be able to recover the full amount of his claim from property outside of the mortgaged security, as he has the right to do. To make the judgment less than the full amount would deprive him of this right. The amount of the judgment on the foreclosure proceedings must be the amount of the mortgage debt; otherwise, the mortgagor might redeem for less than that amount. If the mortgagee was bringing his personal action on the mortgage debt after foreclosure, it would be necessary to ascertain the value of the land to determine whether the mortgage debt was satisfied, and, if not, the amount for which the judgment should issue.

In this case, the mortgagee is pursuing his remedies concurrently, and the value of the mortgaged property at this time is

not material to the issue in the foreclosure suit, or in the personal suit on the mortgage debt. Subsequent payment or satisfaction of the debt in whatsoever way made, whether upon the personal judgment by levy on property other than the mortgaged property, or upon the foreclosure proceeding, will discharge both proceedings; and a partial payment or satisfaction upon either will operate as a discharge of both judgments to the amount of ¹⁷⁸ the payment: 2 Jones on Mortgages, sec. 1219; Woodbury v. Swan, 58 N. H. 380, 383; Dearborn v. Nelson, 61 N. H. 249.

Application to the court, when the foreclosure is complete, for an injunction to restrain the plaintiff from collecting the judgment, on the ground that it is satisfied or nearly so and it would be inequitable to collect it, will bring in issue the question of the value of the land taken on foreclosure, and will furnish a complete and simple remedy.

Exceptions overruled.

Chase, J., did not sit; the others concurred.

Of the Right of a Person Whose Debt is Secured by a Trust Deed Pledge, Mortgage, or Other Lien to Maintain an Action at Law to Recover Judgment on the Debt.

It is a general principle that a party injured, or having a cause of action against another, cannot prosecute independent and inconsistent remedies for redress: Bowen v. Mandeville, 95 N. Y. 237; Pott's Appeal, 5 Pa. St. 500; but, on the other hand, he may prosecute as many remedies as he legally has, provided they are consistent and concurrent: Bowen v. Mandeville, 95 N. Y. 237, 240; and jurisdiction in equity does not oust jurisdiction at law: Duffield v. Rosenzweig, 144 Pa. St. 520. It is also generally, if not universally, conceded, where collateral security is given for the payment of a debt, that the remedies upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution, though but one satisfaction can be obtained therefor: Corn etc. Ins. Co. v. Babcock, 8 Abb. Pr., N. S., 256, 259. In fact, a debt may be enforced though the security is void: Leavitt v. Blatchford, 5 Barb. 9; and the merging of legal and equitable remedies does not prevent a plaintiff from pursuing both remedies: Ellis v. Hussey, 66 N. C. 501; Jones v. Conde, 6 Johns. Ch. 77.

Mortgages.—A creditor, whose debt is secured by way of mortgage may pursue his remedy in personam for the debt, or his remedy in rem to subject the mortgaged property to its payment: Silvey v. Axley, 118 N. C. 959, 963; Ellis v. Hussey, 66 N. C. 501; Cross v. Burns, 17 Ind. 441; Burtis v. Bradford, 122 Mass. 129; Very v. Watkins, 18 Ark. 546; Vansant v. Allmon, 23 Ill. 26, 30; Frank v. Pickle, 2 Wash. Ter. 55; Lichty v. McMartin, 11 Kan. 565; Micou v. Ashurst, 55 Ala. 607; Scott v. Ware, 64 Ala. 174; Brown v. Stewart, 1 Md. Ch. 87;

Wilhelm v. Lee, 2 Md. Ch. 322; Banta v. Wood, 32 Iowa, 469; Brown v. Cascaden, 43 Iowa, 103; Stephens v. Greene Co. Iron Co., 11 Heisk. 71; Jones v. Conde, 6 Johns. Ch. 77; Jackson v. Hull, 10 Johns. 481. He may also bring an action of ejectment, in addition to his action on the debt secured, or bill for foreclosure and sale: Gilman v. Illinois etc. Tel. Co., 91 U. S. 603, 616; Jackson v. Hull, 10 Johns. 481; Smith v. Shuler, 12 Serg. & R. 240; New Haven Sav. etc. Assn. v. McPartlan, 40 Conn. 90; Duval v. McLoskey, 1 Ala. 708; Hughes v. Edwards, 9 Wheat. 489; Morrison v. Buckner, Hemp. 442. Thus, the pendency of a suit upon a bond is no bar to an action of ejectment for the recovery of lands mortgaged to secure the same debt: Coit v. Fitch, Kirby, 254, 1 Am. Dec. 20; and recovery of judgment in an action upon a mortgage note, without payment, does not bar a writ of entry to foreclose the mortgage: Torrey v. Cook, 116 Mass. 163; Ely v. Ely, 6 Gray, 439; Trustees v. Connolly, 157 Mass. 272.

The case of a mortgage is an exception to the general rule that a party shall not be allowed to sue at law and in equity for the same debt, and a mortgagee may pursue all his remedies at once, though he is under no obligation to do so. He may pursue them concurrently or successively. He may bring an action at law to recover his debt, or an action of trespass or ejectment for the mortgaged premises, or he may foreclose in equity, and a resort to one of these remedies is no waiver of the others: Silvey v. Axley, 118 N. C. 959; Micou v. Ashurst, 55 Ala. 607; Gilman v. Illinois etc. Tel. Co., 91 U. S. 603, 616; Brown v. Stewart, 1 Md. Ch. 87; Connecticut etc. Ins. Co. v. Jones, 1 McCrary, 388; Wilhelm v. Lee, 2 Md. Ch. 322.

A mortgagee who has been fraudulently induced to lend money on land in excess of its value may enforce his security against the land, and, at the same time, maintain an action against the borrower to recover damages for the fraudulent representations: Union Cent. etc. Ins. Co. v. Schidler, 130 Ind. 214. A mortgagee or his assignee has the right to collect the mortgage debt by a suit at law on the notes, or by foreclosure in equity, and the fact that the mortgagor's equity of redemption has been sold on execution for other indebtedness does not change the rule, or deprive the holder of the mortgage indebtedness of his right of election. The purchase of such equity on execution, by a stranger to the mortgage, for other indebtedness, does not affect the right of the mortgagee, or his assignee, to resort to any or all the remedies he had previously. Such a purchase does not render the purchaser the debtor of the mortgagee or his assignee, and release the mortgagor, either at law or in equity: Rogers v. Meyers, 68 Ill. 92. A payee of a note, signed by a principal and a surety, and secured by a mortgage of land from the principal, may maintain an action on the note against the surety, without first resorting to the security: Allen v. Woodard, 125 Mass. 400, 28 Am. Rep. 250. An action on a note secured by mortgage is transitory, and may be brought wherever the debtor is found; while the action

to foreclose the mortgage is local, and can only be brought in the county and state where the land lies. The owner, however, has his election whether he will sue on the note alone, or sue on the note and mortgage together: *Lichty v. McMartin*, 11 Kan. 565. A debt may be recovered, though the mortgage securing it is void: *Shaver v. Bear River etc. Min. Co.*, 10 Cal. 396. A judgment against the validity of a mortgage, given to secure a note, is not, per se, a bar to a suit upon the note: *Lander v. Arno*, 65 Me. 26. So a pending action to foreclose a mortgage is no bar to an action at law on the bond accompanying the mortgage: *Copperthwait v. Dummer*, 18 N. J. L. 258; and the dismissal of a bill to foreclose a mortgage securing a note is no bar to a suit on the note: *Longworth v. Flagg*, 10 Ohio, 300. The holder of a note secured by a mortgage upon real estate may waive a foreclosure, and sue upon the note alone: *Banta v. Wood*, 32 Iowa, 469. A mortgagee is not confined to the remedy of foreclosure, but may maintain an action at law upon the note, bond, or other obligation secured by the mortgage: *Brown v. Cascaden*, 43 Iowa, 103.

After default in the payment of a secured debt, there are defenses peculiar to each of the remedies which the mortgagee may pursue. The period of time which would be a bar to an action at law on the note or debt may be shorter than that which would be necessary to constitute a bar to the right of foreclosure: *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; *Scott v. Ware*, 64 Ala. 174; *Pratt v. Huggins*, 29 Barb. 277. But see *Schifferstein v. Allison*, 123 Ill. 662; *Von Campe v. Chicago*, 140 Ill. 361. Hence, a judgment of foreclosure and sale may be rendered upon a mortgage though an action upon the note secured was barred by the statute of limitations before the commencement of the action: *Knox v. Galligan*, 21 Wis. 470; *Wiswell v. Baxter*, 20 Wis. 713 (*680).

A judgment at law upon a secured obligation does not waive or impair the right to foreclose a mortgage given as such security: *Vansant v. Allmon*, 23 Ill. 26, 31; *Thornton v. Pigg*, 24 Mo. 249; *Wahl v. Phillips*, 12 Iowa, 81; *O'Leary v. Snediker*, 16 Ind. 404. A creditor having a note and mortgage may obtain judgment on the note and subject other property of the debtor to its payment: *Karnes v. Lloyd*, 52 Ill. 113; and a mortgagee, though he has already recovered a personal judgment against the mortgagor, on the note secured by the mortgage, may afterward prosecute a suit to foreclose upon the note and mortgage, and recover another personal judgment, in connection with the foreclosure decree, against the mortgagor, the amount of the latter judgment being measured either by the note or the former recovery upon it: *Duck v. Wilson*, 19 Ind. 190. If a mortgage executed to secure a promissory note is foreclosed, a judgment in favor of the holder of the note cannot affect the security afforded by the mortgage to one not a party to the proceeding, and who holds another unpaid note, jointly secured by the same mortgage: *Delespine v. Campbell*, 52 Tex. 4. If two parties bring separate suits on

promissory notes, each secured by the same mortgage, and judgments of foreclosure are rendered in each without regard to the rights of the other party, neither judgment can exclusively appropriate the security: *Delespine v. Campbell*, 52 Tex. 4.

A creditor, though secured by a mortgage, may sue on his debt and collect it through execution; and, if he fails to get satisfaction through the execution, he may afterward file a bill to enforce the mortgage: *Stephens v. Greene County Iron Co.*, 11 Heisk. 71. While a mortgage can be foreclosed, though a suit at law is pending on the note, a payment of one will be in satisfaction of both: *Knetzer v. Bradstreet*, 1 Greene, 382; *Fairman v. Farmer*, 4 Ind. 436; *Morgan v. Sherwood*, 53 Ill. 171.

It is to be observed, however, that under the statutes of some of the states no proceedings at law can be had for the recovery of a debt after the filing of a bill for foreclosure, unless authorized by the court having jurisdiction of the suit of foreclosure: *Clapp v. Maxwell*, 13 Neb. 542; *Maxwell v. Home Fire Ins. Co.*, 57 Neb. 207; *Meehan v. First Nat. Bank*, 44 Neb. 213; and such provisions limit the prosecution of a suit at law, not only against the mortgagor, but against one who has assumed the mortgage debt: *Williamson v. Champlin*, 8 Paige, 70; *Suydam v. Bartle*, 9 Paige, 294; overruling *Pattison v. Powers*, 4 Paige, 549; *Comstock v. Drohan*, 71 N. Y. 9; *Scofield v. Doscher*, 72 N. Y. 491. Under such statutes, it is held that proceeding at law, without leave of court, while a foreclosure in chancery is pending is an abuse of discretion; that leave in such a case ought not to be granted ex parte where the defendant is within reach; and that the proper way to take advantage of the foreclosure is to move the court, before going to trial, for a stay of the legal proceedings: *Goodrich v. White*, 39 Mich. 489. Compare *Shufelt v. Shufelt*, 9 Paige, 137, 37 Am. Dec. 381; *Dennis v. Hemingway*, Walk. Ch. 387. And authority to bring the action at law should be alleged, or at least proved, by the plaintiff, for, without authority the action cannot be maintained: *Meehan v. First Nat. Bank*, 44 Neb. 213. See *Jones v. Burtis*, 57 Neb. 604. In such cases, the fact of deterioration in the value of the mortgaged premises by fire is not a sufficient ground upon which to allow the complainant to pursue different remedies at the same time: *Engle v. Underhill*, 3 Edw. Ch. 249. So, under statutes prohibiting an action at law, unless authorized by the court, to recover a debt secured by a mortgage, during the pendency of an action to foreclose the mortgage, or "after a decree rendered thereon," the court is not absolutely bound to grant an application for leave to commence an action to recover a deficiency arising upon a sale under a judgment in a foreclosure suit in which no provision was made for a deficiency, but may, in the exercise of a sound discretion, and in view of the equities of the case, grant or refuse it: *Equitable Life Ins. Soc. v. Stevens*, 63 N. Y. 341. The object of such statutes is to confine all the proceedings for the collection of the mortgage debt to one court and one action. Hence, an action,

brought without leave of court, to recover a deficiency arising on a foreclosure sale, against the executor of a grantee of a portion of the mortgaged premises, who has covenanted to pay a portion of the mortgage, is not maintainable: *Scofield v. Doscher*, 72 N. Y. 491. Compare *Comstock v. Drohan*, 71 N. Y. 9. It seems that, if a mortgagee has voluntarily refrained from asking a decree for any deficiency, some satisfactory reason should be assigned for permitting him to institute a separate action at law for its recovery: *Equitable Life Ins. Soc. v. Stevens*, 63 N. Y. 341, 345.

Another thing to be observed, and which may deprive a mortgagee of his double remedy, is the form of the mortgage. If the mortgage itself contains an express covenant for the payment of a sum of money, the mortgagor thereby becomes liable to a personal action for the debt; but an ordinary mortgage or deed of trust which contains no covenant for the payment of a debt is not evidence of indebtedness; and, where there is no personal obligation and no personal covenant in the mortgage, the only remedy is against the property mortgaged: *Elder v. Rouse*, 15 Wend. 218; *Scott v. Fields*, 7 Watts, 360; *Fidelity etc. Trust Co. v. Miller*, 89 Pa. St. 26; *Baum v. Tonkin*, 110 Pa. St. 569, 573; *Coleman v. Van Renssalaer*, 44 How. Pr. 368; *Gaylord v. Knapp*, 15 Hun, 87; *Spencer v. Spencer*, 95 N. Y. 353; *Weil v. Churchman*, 52 Iowa, 253; *Von Campe v. Chicago*, 140 Ill. 361. Thus an action of debt cannot be maintained upon a chattel mortgage to recover a sum of money secured thereby, unless the instrument contains an express agreement to pay the sum, or a distinct acknowledgment of an existing debt: *Culver v. Sisson*, 3 N. Y. 264; *Weed v. Covill*, 14 Barb. 242. An admission of indebtedness in a mortgage, on the part of the mortgagor, raises an implied promise, and creates a personal liability, but the promise must be express and unequivocal: *Coleman v. Van Renssalaer*, 44 How. Pr. 368. If a debt is not evidenced by a note, but the mortgage contains a recital that the mortgagor is "justly indebted" in a certain sum, and a covenant that he will pay the deficiency, if, from any cause, the property fails to satisfy the debt, the instrument amounts to an acknowledgment of indebtedness and a promise to pay, and the mortgagee may maintain an action upon the debt without first foreclosing the mortgage: *Newbury v. Rutter*, 38 Iowa, 179. A mortgagee may, also, in an action of debt, recover against a mortgagor upon proof of his parol agreement to pay the mortgage debt: *Tonkin v. Baum*, 114 Pa. St. 414.

Other circumstances than the form of the mortgage may also exclude a personal remedy against a mortgagor. Thus, a mortgagee will lose his right to sue the mortgagor for the debt by so dealing with the mortgaged property as to put it out of his power to restore it upon a tender of full payment. For example, if a mortgagee concurs with the transferee of the equity of redemption in selling the property, and he allows such transferee to receive the purchase money, the mortgagee cannot afterward sue the mortgagor for the debt: *Palmer v. Hendrie*, 27 Beav. 349; 28 Beav. 341. So, if an

owner of land, having mortgaged it, subsequently sells the equity of redemption by a deed stipulating that the grantee shall assume and pay the mortgage, and takes back a second mortgage to himself reciting this stipulation, the assignee of the second mortgage, though he has also taken an assignment of the first mortgage, will not be allowed to sue on the first mortgage note. He is precluded from resorting to the personal liability of the mortgagor by reason of the equity or agreement between the parties, of which he had knowledge: *Sweet v. Sherman*, 109 Mass. 231. It is, of course, competent for a creditor who holds a mortgage or other security for a subsisting debt to absolve the debtor from personal obligation, and agree to have recourse to the security alone for payment: *Ball v. Wyeth*, 99 Mass. 338; *Kennion v. Kelsey*, 10 Iowa, 443; and, in some of the states, the mortgagee is, by statute, required first to exhaust his remedy against the mortgaged property before he will be allowed to pursue a personal liability on the part of the mortgagor. The security must first be exhausted if it has any value: *Bartlett v. Cottle*, 63 Cal. 366; *Johnson v. Lewis*, 13 Minn. 364; *Hyman v. Kelly*, 1 Nev. 179, 186; *Weil v. Howard*, 4 Nev. 384. A creditor whose debt is secured by mortgage may either commence and prosecute to judgment an action at law to recover his debt, or enforce its payment by means of foreclosure; but, having elected his remedy, he must exhaust the remedy so chosen before resorting to the other: *Meehan v. First Nat. Bank*, 44 Neb. 213; *Maxwell v. Home Fire Ins. Co.*, 57 Neb. 207. In Iowa, a mortgagee is not confined to one remedy, but, if separate actions are commenced upon a covenant for the payment of money and for the foreclosure of the mortgage, the plaintiff may elect which he will pursue, and his election of the one remedy will have the effect of continuing the other: *Brown v. Cascaden*, 43 Iowa, 103. A sale of mortgaged real estate on execution upon a personal judgment taken upon the mortgage debt is void in Indiana: *Boone v. Armstrong*, 87 Ind. 168. A personal judgment cannot be rendered against the wife of a mortgagor, in the absence of an allegation that the debt is one for which her separate estate is answerable: *McGlaughlin v. O'Rourke*, 12 Iowa, 459. If a mortgage is made to secure another's debt, and no personal liability is imposed upon the mortgagor, by the terms of the instrument, or otherwise, the mortgagor is not personally answerable for the debt, and no general execution can issue against him: *Chittenden v. Gossage*, 18 Iowa, 157. A decree of foreclosure before sale is no bar to a suit upon the mortgage debt while the decree is under the control of the court rendering it, as it or the sale under it may be set aside. An action so commenced may, of course, be defeated by the subsequent sale of the property and satisfaction of the debt from the proceeds; but, until that occurs, the debt stands, and, if there is no sale, or the sale is set aside, the action may be prosecuted to judgment. There is no absolute satisfaction until the sale is consummated, but, when the sale is complete, it relates back to the day of sale, and

defeats any proceedings then pending upon the debt: *Morgan v. Sherwood*, 53 Ill. 171.

As the holder of a mortgage is entitled to recover the full amount of the mortgage debt, he may maintain an action on the debt for what remains due, where there is a deficiency after foreclosure of the mortgage, either by suit or under a power of sale: *Marston v. Marston*, 45 Me. 412; *Stevens v. Dufour*, 1 Blackf. 386; *Watson v. Hawkins*, 60 Mo. 550; *Wing v. Hayford*, 124 Mass. 249; *Porter v. Pillsbury*, 36 Me. 278; *Lansing v. Goelet*, 9 Cow. 346; *Globe Ins. Co. v. Lansing*, 5 Cow. 380, 15 Am. Dec. 474; *Omaly v. Swan*, 3 Mason, 474. The foreclosure is a payment of the debt to the amount received from the sale, or to the value of the property in case of a foreclosure without sale: *Duval v. McLoskey*, 1 Ala. 708; *Hunt v. Stiles*, 10 N. H. 466; *Bassett v. Mason*, 18 Conn. 131. But, in some of the states, prior permission to bring an action of debt for a deficiency must be obtained of the court in which the foreclosure proceeding is had: *Equitable Life Ins. Soc. v. Stevens*, 63 N. Y. 341; *Comstock v. Drohan*, 71 N. Y. 9; *Scofield v. Doscher*, 72 N. Y. 491. If, however, a foreclosure is had in one state, where leave of court to sue at law is required, and a personal judgment is sought against the defendant in another state, such prior permission of the former state court is not a prerequisite to the maintenance of an action against a resident of the latter state for an unpaid balance of the mortgage debt: *Williams v. Follett*, 17 Colo. 51. A judgment at law for a deficiency does not open the foreclosure sale and authorize the debtor to redeem the property: *Weld v. Rees*, 48 Ill. 429.

A personal judgment against a mortgagor for a deficiency, after a foreclosure sale, cannot be rendered before the deficiency becomes due according to the contract: *Danforth v. Coleman*, 23 Wis. 528. A note not due when a mortgage, by which it is secured, is foreclosed is not merged in the decree, and the decree is not a bar to a personal action on the note, brought against the mortgagor. If mortgaged premises are all sold to satisfy a first installment due upon the mortgage, the court cannot enter up a personal judgment against the mortgagor, for a subsequent installment when it becomes due; and a decree of foreclosure of a mortgage, of which one installment only is due, containing a clause allowing the plaintiff to apply for a further order of sale upon a subsequent installment falling due, and for an execution for any deficiency that might remain, where the entire premises were sold and did not bring enough to pay the first installment for which the decree was rendered, is not a bar to a personal action against the mortgagor for a subsequent installment when it becomes due: *Bliss v. Weil*, 14 Wis. 35, 80 Am. Dec. 766. In those jurisdictions where the mortgagee, in a foreclosure suit, is entitled to a personal judgment for a deficiency remaining after a sale of the property, an action at law on the debt should not be allowed concurrently with an equitable

sult to foreclose by sale and for judgment for deficiency: *Anderson v. Pilgram*, 30 S. C. 499, 14 Am. St. Rep. 917.

Trust Deeds.—A creditor whose debt is secured by a trust deed has two remedies, one in personam for his debt, the other in rem, to subject the property to its payment: *Silvey v. Axley*, 118 N. C. 959, 962; *Watson v. Hawkins*, 60 Mo. 550, 553; *Gregory v. Marks*, 8 Biss. 44; *Stephens v. Greene County Iron Co.*, 11 Heisk. 71; *Weld v. Rees*, 48 Ill. 428; *Mallory v. Kessler*, 18 Utah, 11, 72 Am. St. Rep. 765. If the creditor first resorts to a sale of the property conveyed, and, after regular proceedings, finds that the amount realized therefrom is insufficient to pay the debt, this does not prevent him from proceeding in an ordinary action at law to obtain a personal judgment for the deficiency: *Mallory v. Kessler*, 18 Utah, 11, 72 Am. St. Rep. 765; *Watson v. Hawkins*, 60 Mo. 550, 553; *Gregory v. Marks*, 8 Biss. 44; *Weld v. Rees*, 48 Ill. 428; and a statute providing that but one action can be maintained to recover a debt secured by mortgage does not bar an action to recover a balance due after a sale under a trust deed, and which remains unsecured: *Mallory v. Kessler*, 18 Utah, 11, 72 Am. St. Rep. 765. If a trust deed provides that the whole debt evidenced by a note shall become due upon default in the payment of any installment of principal or interest, an action at law may be maintained for the balance due upon the note after foreclosure of the deed, though the note, by its terms, is not due: *Gregory v. Marks*, 8 Biss. 44. A judgment at law for a deficiency, after a sale of property conveyed by a deed of trust, does not open the sale and authorize the debtor to redeem the trust property: *Weld v. Rees*, 48 Ill. 428. A creditor, secured by a deed of trust, may sue on his debt, and, if he fails to collect it upon execution, he may file a bill to enforce the deed of trust lien: *Stephens v. Greene County Iron Co.*, 11 Heisk. 71.

Pledge and Collateral Security.—If property is pledged to secure a debt, the pledgee may maintain an action for the debt without first exhausting the subject of the pledge: *Ehrlich v. Ewald*, 66 Cal. 97; but the pledgee's lien is lost the moment that he parts with possession, or claims the right to detain the property upon a different ground. Hence, if he causes it to be attached as the property of the pledgor, he cannot afterward claim the property under a pledge antedating the attachment: *Citizens' Bank v. Dows*, 68 Iowa, 460. When the pledgee sues for the debt for which the pledge was made, the defendant may set up a wrongful conversion of the pledge by way of a defense and be allowed the value of the pledge as payment of the debt pro tanto: *Donnell v. Wyckoff*, 49 N. J. L. 48. But a creditor who holds a promissory note belonging to his debtor as collateral security for his debtor's note cannot be compelled to exhaust the collateral security held by him as a condition precedent to sue his debtor upon the latter's note: *Carson v. Buckstaff*, 57 Neb. 262; and, if a person executes a promissory note and transfers to the payee, as collateral security thereto, a note then held against a third person, secured by a mortgage on real estate, a decree

foreclosing the mortgage does not bar an action at law on the note secured by the mortgage: *Maxwell v. Home Fire Ins. Co.*, 57 Neb. 207.

The taking of collateral security does not bar a suit on the debt secured: *Dugan v. Sprague*, 2 Ind. 600; *Mills v. Gould*, 14 Ind. 278; though the creditor covenants or promises not to sue the debtor until the securities are given up, and he brings suit before they are given up: *Foster v. Purdy*, 5 Met. 442. A creditor has a right to enforce either one of two securities, as may be most to his advantage: *Morris v. Fales*, 43 Hun, 393. If he has several securities for the same cause of action, he can pursue them all to judgment at the same time, though he is entitled to but one satisfaction: *Stillwell v. Bertrand*, 22 Ark. 379; *Houser v. Houser*, 43 Ga. 415. A defendant is answerable for his debt though the security given for its payment is void: *Little v. Fowler*, 1 Root, 94. Where collaterals have never been in the possession or control of the creditor, but have been placed by the debtor in the hands of a third person appointed by himself, the creditor may recover on the principal security, though the collaterals are not accounted for: *Bank of United States v. Peabody*, 20 Pa. St. 454.

Vendor and Purchaser.—A vendor of land may sue at law upon the note given for the purchase money, and, at the same time, proceed in equity to enforce a lien reserved in his deed for the payment of the debt. The taking of a judgment at law does not abrogate or defeat a vendor's lien to secure the debt, and a vendor is entitled to a decree for the sale of land on which he has a vendor's lien, although he may also have a judgment at law for the amount. The taking of a personal judgment does not waive a vendor's lien: *Palmer v. Harris*, 100 Ill. 276; *Zwingle v. Wilkinson*, 94 Tenn. 246; *Kane v. Mann*, 93 Va. 239, 248; *Howard v. Herman*, 9 Tex. Civ. App. 79; *Micou v. Ashurst*, 55 Ala. 607; *Waldrom v. Zacharie*, 54 Tex. 503; *Ellis v. Hussey*, 66 N. C. 501. It is said that a vendor, like a mortgagee, after default, has three remedies—to proceed in equity to enforce the lien given him by law for the payment of the purchase money, to sue in ejectment to recover possession of the land, or to sue at law for the recovery of the purchase money—that he may pursue these remedies concurrently; and that a court of equity, in the absence of some evidence of fraud or oppression, or of some fact rendering it inequitable, will not restrain him from pursuing them all at the same time: *Micou v. Ashurst*, 55 Ala. 607, 615; *Ellis v. Hussey*, 66 N. C. 501.

A vendor of land, having an equitable lien thereon for purchase money, may seek his legal remedy upon his money demand, together with the enforcement of his lien in one action, under a statute which abolishes distinctions between actions at law and suits in equity; but he may first pursue his remedy upon his legal claim alone, without thereby waiving his right to afterward resort, if necessary, to the equitable enforcement of his lien: *Kern v. Hazlerigg*, 11 Ind. 443, 71 Am. Dec. 360; *Nutter v. Fouch*, 86 Ind. 451;

Dibblee v. Mitchell, 15 Ind. 435, 77 Am. Dec. 99. A vendor's lien cannot be enforced after the debt is barred by the statute of limitations: **Stephens v. Shannon**, 43 Ark. 464. If a note is a lien on land for unpaid purchase money, a judgment upon the note preserves the lien, so that if a suit is brought upon the personal judgment to revive it, and to have it declared a lien on the land, though more than the period of limitation has elapsed from the maturity of the note to the institution of the second suit, the bar of the statute of limitations does not apply. The note, which holds the lien, having been merged in the first judgment, no limitation as to the lien can apply, so long as the judgment remains a valid and subsisting claim against the debtor: **Slaughter v. Owens**, 60 Tex. 668. Compare **Beck v. Tarrant**, 61 Tex. 402.

There are authorities, however, which hold that a vendor's lien is waived if the vendor brings an action at law and recovers an ordinary money judgment for the purchase price: **Fitzell v. Leaky**, 72 Cal. 477. See, also, **Dickason v. Eby**, 73 Mo. 133. It seems, too, that if a vendor who holds a grantor's lien for purchase money causes the land to be sold on execution for the purpose of satisfying the debt for which he claims a lien, he will have thereby waived his lien, whether the sale produces a sum sufficient to satisfy the debt or not: **Yetter v. Flitts**, 113 Ind. 34, 36; **Nutter v. Fouch**, 86 Ind. 451. Compare **Dickason v. Eby**, 73 Mo. 133, 140. A vendor's lien on land for unpaid purchase money is said not to be an original and absolute charge on the land, but only an equitable right to resort thereto if the personal assets are insufficient: **Nutter v. Fouch**, 86 Ind. 451; **Fitzell v. Leaky**, 72 Cal. 477. It has therefore been held that such a lien can be enforced only in equity: **Fitzell v. Leaky**, 72 Cal. 477; and that, in an action at law to enforce such lien, where the complaint fails to allege, and the evidence does not show, that the vendee has no other property subject to execution, the judgment should not direct a sale of the land, except in the event that no other property of the vendee subject to execution can be found to satisfy the execution: **Nutter v. Fouch**, 86 Ind. 451.

SADDLERY HARDWARE MANUFACTURING COMPANY v. HILLSBOROUGH MILLS.

[68 NEW HAMPSHIRE, 216.]

CONTRACTS IN RESTRAINT OF TRADE are not favored in law, and are not to be extended by construction beyond the fair and natural import of the language used.

CONTRACTS—RESTRAINT OF TRADE—AGREEMENT NOT TO SELL—TERMINATION OF.—If one sells goods, such as blankets, a stipulation in the agreement that the vendor will not sell like goods to anyone else in a certain locality, with no limitation as to time, terminates after the vendee has had a reasonable opportunity to dispose of the goods so purchased, in the usual course of trade.

DAMAGES—BREACH OF CONTRACT IN RESTRAINT OF TRADE—LOSS OF PROFITS ON GOODS NOT INCLUDED IN CONTRACT.—If a seller agrees, in writing, not to sell like goods to anyone else in a certain locality, with no limitation as to time, the vendee cannot, in an action for breach of the contract, recover damages for a loss of profits on goods purchased subsequently to the execution of the written contract and not included in it.

Assumpsit for breach of a contract entered into between the plaintiffs and the defendants on March 5, 1892, whereby the defendants had agreed in writing to sell and ship to the plaintiffs six hundred and twenty-two blankets of different styles, at prices specified, and "not to sell plaid blankets to anyone else in New York City." The defendants, however, notwithstanding such contract, did sell plaid blankets to other parties than the plaintiffs. Oral testimony was offered by the plaintiffs to show that the agent had, prior to the agreement of sale, stated to the defendants' treasurer that, if the plaintiffs had the exclusive sale, they would probably be able to sell three thousand blankets; that the plaintiffs, in consequence of orders taken by them after the agreement, purchased of the defendants two hundred and seventy-five additional blankets, the order having been contemplated by both parties prior to the execution of the original contract, and given before the plaintiffs became aware of the breach of that contract; and that the plaintiffs had suffered a loss of profits in the sale of these blankets because of such breach of contract. This testimony was excluded, and the plaintiffs excepted. The court, subject to the exception, instructed the jury as follows: "The defendants' agreement not to sell plaid blankets in New York City continued only so long as would afford the plaintiffs a reasonable opportunity to sell their six hundred and twenty-two blankets in the usual course of trade. It terminated whenever the six hundred and twenty-two blan-

kets were sold, even if they were sold immediately after March 5th; and it terminated at the expiration of a reasonable length of time after that date, whether the blankets had then been sold or not—that is, such a length of time as would afford the plaintiffs a reasonable opportunity to dispose of the blankets in the usual course of trade with the exercise of reasonable diligence and skill. What was such reasonable length of time is a question for your determination. The defendants are not liable in this action for any loss the plaintiffs may have suffered in the sale of blankets purchased by them of the defendants after March 5, 1892.” There was a verdict of damages for the plaintiffs, which they moved to set aside so far as to permit them to show the loss suffered on blankets purchased after March 5, 1892, and before they became aware of the breach of the contract, as well as the loss of profits on other blankets, the purchase of which the parties contemplated while the contract between them was in force, but which purchase was not consummated because of the breach of the contract.

George B. French, for the plaintiffs.

William W. Bailey, for the defendants.

217 SMITH, J. The exceptions relate to the question of damages, and the damages depend upon the construction of the contract.

There is no provision in the contract that the plaintiffs will buy or the defendants sell more blankets at the same or other prices. Whatever either party may have had in contemplation as to further purchases or sales, they came to no agreement or understanding in relation to the matter, and neither could compel the other respectively to buy or sell, nor recover damages for his refusal. The fact that two of the blankets were designated as “sample” indicates that the parties had in mind that the plaintiffs might purchase more blankets of those styles. But the entire absence of any stipulation to that effect is conclusive that neither party understood there was a contract for such further purchase or sale.

The agreement not to sell to others is without limitation as to time. There are cases of contracts in restraint of trade where it has been held that the contract terminated only with the life of the vendor. In *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317, Buss sold his teaming business over a particular route to Webster, and agreed not to interfere with the business. If Webster or his assigns should carry on the business of which he had purchased the exclusive right of Buss so long as the latter

might live, it is manifest that a reasonable construction of the agreement required that Buss should abstain from interference so long as the business was carried on.

It must be assumed that the plaintiffs paid a larger price than they otherwise would, because of the defendants' agreement not to sell to others in the city where they were engaged in selling blankets. The less competition, the greater, ordinarily, would be their profits. Contracts in restraint of trade are not favored in the law, and are not to be extended by construction beyond the fair and natural import of the language used: *Smith v. Gibbs*, 44 N. H. 335; *Bowers v. Whittle*, 63 N. H. 147, 56 Am. Rep. 499. As the contract ²¹⁸ not to sell contains no limit as to time, the reasonable construction is, that the parties intended it to continue so long as necessary to protect the plaintiffs from competition in the sale of the goods purchased. If the contract had been not to sell to others in New York so long as the plaintiffs would buy blankets of the defendants, the case would be altogether different from the present. Here was not only no agreement to purchase more blankets, but an entire omission of the quantity and prices of future purchases. The improbability is so great that the defendants would have bound themselves for an indefinite period not to make sales to others in New York, without an agreement from the plaintiffs for the purchase of some definite quantity of goods at a fixed price, that an agreement in restraint for an indefinite period cannot be read into the contract within the reasonable rules of construction.

It cannot be supposed the parties intended the restraint to last after the necessity for it ceased to exist. Such a construction would be unreasonable. The object of the parties was the prevention of competition. This case, in principle, does not differ from the cases generally in restraint of trade. In *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317, the purchaser could not enjoy the full fruits of his purchase unless the vendor refrained from interference so long as he carried on the business. So here, the object of the parties—the prevention of competition—required the defendants to refrain from sales to other New York dealers until the plaintiffs could sell, in the ordinary course of business, the blankets which they bought on the faith of the defendants' contract. The true rule was given in the instructions to the jury, to wit: The stipulation not to sell to others in New York continued for such length of time as would afford the plaintiffs a reasonable opportunity for disposing of the blankets in the usual course of trade with the exercise of due diligence and skill.

The evidence offered by the plaintiffs, and excluded, related to a conversation prior to the negotiation which terminated in the written contract, in which all prior negotiations were merged, and therefore was properly rejected. An additional objection to it is, that there was no agreement for a sale of three thousand blankets, but a statement merely by the plaintiffs' agent that, if they could have the exclusive sale in New York City, they could probably sell that number of blankets. No time within which they could have sold that quantity, and no price which they would have been willing to pay, seems to have been mentioned.

Evidence of the purchase of two hundred and seventy-five blankets in September, 1892, was immaterial. They were not included in the written contract.

The motion to set aside the verdict must be denied, and the exceptions overruled.

Chase, J., did not sit; the others concurred.

CONTRACTS IN PARTIAL RESTRAINT OF TRADE will be upheld when the restriction does not go beyond some particular locality, is founded upon sufficient consideration, and is limited as to time, place, and person: *Chapin v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297. If the restriction in the contract is unlimited in point of time, and is otherwise reasonable, it continues during the life of the promisor: *Note to Kramer v. Old*, 56 Am. St. Rep. 656.

BADGER v. PLATTS.

[6: NEW HAMPSHIRE, 222.]

INSURANCE—USE OF NAPHTHA BY TENANT—VOID POLICY.—If a policy of insurance provides that it shall be void if naphtha is used on the premises insured, the use of naphtha by a tenant of the insured invalidates the policy, so far as the insured is concerned, whether he knows of its use or not.

INSURANCE—PAYMENT, BY COMPANY, OF MORTGAGE DEBT—ASSIGNMENT—SUBROGATION—REDEMPTION.—When an insurance policy is payable, in case of loss, to a mortgagee, a stipulation therein that, when no liability exists as to the mortgagor, or owner, the company may pay the debt due to the mortgagee and take an assignment of the mortgage, binds an assignee of the policy. Such payment does not extinguish the debt and discharge the mortgage, but subrogates the insurance company to the mortgagee's right therein, and the mortgagee's assignment to the company of the debt and mortgage, and its assignment of them to another, vest in the latter a title thereto which he can enforce by foreclosure. Hence, one who has purchased the equity of redemption, and who has accepted an assignment of the policy to himself, cannot redeem without paying the whole debt to the one who holds it and the mortgage security.

The first case was a petition for the determination of the amount due on two real estate mortgages. The second case was a writ of entry to foreclose the mortgages. The mortgaged premises were, on June 24, 1892, conveyed to Melvin Badger, who assumed the payment of a note for fifteen hundred dollars held by Gilman Clough and secured by a first mortgage on the premises, together with a note for eighteen hundred dollars, held by Freeman N. Thurber, and secured by a second mortgage on the premises. The buildings on the land were insured in the North British and Mercantile Insurance Company for two thousand dollars, payable, in case of loss, to Thurber, as his interest might appear, subject to prior payment to Clough, as his mortgage interest might appear; and in the Phenix Assurance Company, for seven hundred dollars, payable, in case of loss, to Thurber as his mortgage interest might appear. Originally, both policies were issued to Thurber, but, with the companies' assent, he assigned them to Badger. The buildings were destroyed by fire on July 24, 1892. Prior and subsequent to the conveyance to Badger, a portion of the buildings was occupied by a tenant, and used as a laundry. Naphtha or gasoline was used to run an engine in the laundry, and the fire was caused by an explosion of naphtha while being lighted by an employé of the tenant. Clough did not know of this use of naphtha, and Badger claimed that he did not know it. Proofs of loss were properly made to both companies. The North British Company claimed that the fire was caused by the unauthorized use of naphtha or gasoline on the premises. The use of naphtha on the premises was prohibited by the terms of that company's policy. It contained, also, a provision that no act or default of any person, other than the mortgagee, or his agents, or those claiming under him, should affect his right to recover in case of loss, and the further provision that the company, when liable to a mortgagee, and not answerable on any liability as to the mortgagor, might protect itself by paying the amount due upon the mortgage note and taking an assignment of the note and mortgage, which the mortgagee was required to make, after such payment, if called for by the company. Augustus Champ-
lin, the resident secretary of the North British Company, on September 21, 1892, and without Badger's knowledge or consent, paid to Clough fifteen hundred and twenty-eight dollars and seventy-five cents, the amount due on his note less the additional premium charged for extra risk from the use of naphtha. Clough indorsed the note without recourse, and assigned the

mortgage securing it to Champlin as resident secretary. On September 22, 1892, Champlin paid Thurber four hundred and forty-three dollars and seventy-five cents, which Thurber indorsed on his note. When these payments were made, Champlin received from Clough and Thurber the sum of twenty-seven dollars and fifty cents as additional premium for extra hazard incurred by reason of the use of naphtha on the premises. On September 22, 1892, Champlin, without Badger's knowledge or consent, sold the Clough note to Platts for four hundred and forty-three dollars and seventy-five cents, indorsed it without recourse, and assigned the mortgage securing it to Platts. At that time, the Thurber note and mortgage were held by the New Hampshire Trust Company as security for a note on which Platts was holden as a signer with Thurber. Platts paid the trust company note and took the collateral, thus becoming the holder of the Thurber note and the mortgage securing it. The amount due upon this note, on January 23, 1893, was conceded to be five hundred and six dollars and fifteen cents. Platts claimed that the full amount of the Clough note was due him, while Badger contended that Champlin's payment to Clough extinguished the mortgage debt, and that nothing was due thereon.

Sulloway & Topliff, for Badger.

Edwin F. Jones, for Platts.

223 CLARK, J. Platts is the holder of the two notes assumed by Badger and the mortgages securing them. It is agreed that the ²²⁴ amount due upon the eighteen hundred dollar note was five hundred and six dollars and fifteen cents on January 23, 1893. The only question, therefore, is whether the payment of the amount due upon the fifteen hundred dollar note to Clough as mortgagee, by Champlin as agent of the North British and Mercantile Insurance Company, and the assignment by Clough to Champlin of the mortgage securing the note, was a payment of the mortgage debt for the benefit of the mortgagor, or a purchase by the company which subrogated them to the rights of the mortgagee. There is due to Platts the full amount of the Clough note, or nothing.

The use of naphtha on the premises without the knowledge or agency of Clough, or anyone claiming under him, had no effect upon the policy of insurance as to him, and his interest as mortgagee was insured at the time of the fire. By the terms

of the policy, the company had the right to protect themselves by paying the amount due upon the mortgage note and taking an assignment of the mortgage, which they did. By virtue of the assignment the company was invested with the rights of Clough as mortgagee, and could have proceeded to foreclose the mortgage against Badger, the owner of the equity of redemption. The note having been purchased by Platts and the mortgage assigned to him, he stands in the place of the company.

Badger having purchased the equity of redemption and accepted an assignment to himself of the policy issued to Thurber, the assignment having been made with the company's assent, stands in the same position as if he had applied for the policy and made the contract of insurance with the company. It is immaterial whether he knew naphtha was used in the building. Its use was prohibited by the terms of the policy, and it was the duty of Badger, who must be held to have contracted that it should not be used, to know whether that condition was complied with. The use of naphtha by the tenant invalidated the policy so far as Badger was concerned, whether he knew of its use or not: *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 450, 13 Am. St. Rep. 582.

At the time of the fire, the policy was void as to Badger and valid as to Clough. By accepting an assignment of the policy containing the provision that no act or default of any person other than the mortgagee, or his agents, or those claiming under him, should affect his right to recover in case of loss, Badger became bound by that contract, and party to the agreement that the company, if they should so elect, might pay the mortgagee's claim and take an assignment of the mortgage. This payment was not intended or understood to be such as would extinguish Badger's debt and discharge the mortgage, but operated to satisfy Clough's claim and assign the mortgage to the company, leaving it in full force against Badger.

In *Allen v. Watertown Ins. Co.*, 132 Mass. 480, the policy provided that the insurance "as to the interest of the mortgagee 225 only therein" should not be invalidated by the acts of the mortgagor; and that when a loss after a forfeiture was paid to the mortgagee, the company should be subrogated to his rights under the mortgage to the extent of such payment, and might pay the full amount of the debt to the mortgagee and receive an assignment of the mortgage. The court say: "The policy provided that the amount due for a loss after a forfeiture shall not be a fund for the payment of the mortgage debt, but that, upon

payment of the loss, the mortgage shall be a fund for the reimbursement of the defendant. The contract is, that after a forfeiture the insurance shall be exclusively for the benefit of the mortgagee; that the mortgagor and those claiming under him shall have no beneficial interest in the policy, and that payment to the mortgagee shall not discharge the mortgage, but subrogate the defendant to the mortgagee's right in it. It was a contract which the parties were competent to make, and we know no reason why they should not abide by it." To the same effect are *Eliot Sav. Bank v. Commercial Union Co.*, 142 Mass. 142, and *Springfield Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711.

As the amount paid to Clough by the insurance company was not paid in discharge of the mortgage, Platts' claim under the mortgage is the amount of the mortgage note.

Case discharged.

All concurred.

INSURANCE—USE OF GASOLINE—TENANT'S VIOLATION OF CONDITION IN POLICY.—A fire insurance policy containing a provision forbidding the keeping or use of gasoline on the insured premises is rendered void by the violation of such condition by one in the occupancy of the insured premises with the implied consent of the owner: *Note to McKinney v. German etc. Ins. Soc.*, 46 Am. St. Rep. 863. If premises are insured to the owner, and his tenant increases the risk, without the consent of the insurer, and a loss occurs while the risk is so increased, the ignorance of the owner that the risk has been increased is no defense to a condition for forfeiture: *Note to German etc. Ins. Co. v. Board of Commrs.*, 45 Am. St. Rep. 307.

INSURANCE—ASSIGNMENT OF MORTGAGE DEBT—SUBROGATION.—When a policy of insurance provides that the insurer, either before or after paying the loss, is entitled to be subrogated to the mortgagee's rights, as against the mortgagor, and to demand an assignment of part or all of the mortgage debt, the insurer's right to such subrogation and assignment is unquestionable: *Notes to King v. State etc. Fire Ins. Co.*, 54 Am. Dec. 696; *Attleborough Sav. Bank v. Security Ins. Co.*, 60 Am. St. Rep. 376. Compare monographic note to *Oakland etc. Ins. Co. v. Bank of Commerce*, 58 Am. St. Rep. 667-673. on when a condition of forfeiture in a policy of insurance applies against a mortgagee to whom the loss has been made payable.

BELIVEAU v. AMOSKEAG MANUFACTURING CO.

[68 NEW HAMPSHIRE, 225.]

ATTORNEY AND CLIENT—POWER OF DISCHARGED ATTORNEY.—If a client, after discharging his attorney, permits him to remain such on the record, he is bound, as against parties ignorant without fault on their part, of his discharge, by any act that, by virtue of his retainer, he is authorized to do.

ATTORNEY AND CLIENT—POWER OF ATTORNEY TO DISPOSE OF ACTION.—An attorney of record may bind his client to a final disposition of an action by oral or written agreement entered on the record, made an order of court, and executed by the adversary in good faith, without knowledge of any limitation upon the attorney's authority; and the fact that the agreement and order of court thereon effect a compromise of the client's cause of action is an immaterial circumstance.

ATTORNEY AND CLIENT—POWER OF ATTORNEY TO DISPOSE OF INFANT'S ACTION.—An attorney of record for an infant, employed by the infant's next friend, has the same power to bind his client to a final disposition of the action that he would have in the case of an adult, but he is also answerable, as in the case of an adult, for any abuse of his authority, express or implied.

Motion by the plaintiff to strike from the docket an entry reading as follows: "Judgment for the plaintiff by agreement and judgment satisfied." This entry was made in accordance with a written agreement entered into by the attorneys of the parties, entitled as of the term, and filed with the clerk while the court was in session. The agreement was: "That judgment in this case be entered for the plaintiff in the sum of one thousand dollars and costs, and judgment satisfied in full." It appeared that the plaintiff, by her attorney, C., had in February, 1891, commenced an action of case for injuries to her person; that the plaintiff discharged this attorney in August, 1891, and engaged other counsel, who did not, however, appear or enter their names on the docket. The original attorney continued to act for the plaintiff, and remained her only attorney of record; and the defendants, by their attorney, and without any knowledge or reason to believe that C. was not the plaintiff's attorney, entered, in good faith, into the agreement above named, and paid the money to C., who appropriated it to his own use and absconded. After a denial of the motion, the plaintiff moved for a rehearing, calling to the court's special attention authorities which hold that an infant cannot employ an attorney or an agent, or make a valid agreement to compromise his suit; also, that the next friend of an infant is not his agent or attorney, but an officer of the court.

Joseph W. Fellows, Charles F. Stone, and Streeter & Walker,
for the plaintiff.

David Cross and William L. Foster, for the defendants.

220 CARPENTER, J. The rights of the defendants are not affected by the plaintiff's undisclosed discharge of C. So long as she permitted him to remain her attorney of record, she was bound, as against parties ignorant without fault on their part of his discharge, by any act that by virtue of his retainer he was authorized to do: *Lewis v. Sumner*, 13 Met. 269.

It is the constant practice of the court to enter defaults, judgments, assessments of damages, judgments for the defendant, judgment satisfied, and to make various other orders finally disposing of actions, upon the agreement of the counsel for the parties expressed orally in open court. These orders have the same effect as if made upon the personal consent of the parties. In the absence of fraud or mistake, they are conclusive. The authority of attorneys to make such agreements is in practice never questioned. It is essential to the orderly and convenient dispatch of business, and necessary for the protection of the rights of the parties. Exigencies are frequent where the want of power on the part of the attorney to dispose of the action finally by agreement made in and under the sanction of the court would be disastrous to his client. The interests of the public and of the parties to actions alike require that executed agreements of the character in question be not disturbed except, as in other cases, for fraud or mistake. It is not now necessary to consider the question of the extent of an attorney's authority to bind his client by agreement in pais, in collateral matters, or in what cases his executory agreements will be enforced: *Daniels v. New London*, 58 Conn. 156; *Alton v. Gilmanton*, 2 N. H. 520; *Fernald v. Ladd*, 4 N. H. 370; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *White v. Hildreth*, 13 N. H. 104; *Hanson v. Hoitt*, 14 N. H. **227** 56; *Bryant's Case*, 24 N. H. 149; *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Smyth v. Balch*, 40 N. H. 363; *Lisbon v. Holton*, 51 N. H. 209; *Brooks v. New Durham*, 55 N. H. 559; *Everett v. Warner Bank*, 58 N. H. 340.

For the disposition of the present motion, it is enough to say that in the absence of any limitation of his authority known, or that by reasonable inquiry might be known, by the opposite party, an attorney may, by oral or written agreement entered on the record, made an order of court, and executed by the adversary in good faith, bind his client to a final disposition of the

action. That the agreement and order of court thereon effect a compromise of the client's cause of action is an immaterial circumstance: *Swinfen v. Swinfen*, 18 Com. B. 485; 1 Com. B., N. S., 364; 2 De Gex & J. 381; *Swinfen v. Chelmsford*, 5 Hurl. & N. 890; *Fray v. Voules*, 1 El. & E. 839; *Prestwich v. Poley*, 18 Com. B., N. S., 806; *Strauss v. Francis*, L. R. 1 Q. B. 379; *Matthews v. Munster*, 20 Q. B. Div. 141; *Holker v. Parker*, 7 Cranch, 436.

Motion denied.

Smith and Chase, JJ., did not sit; the others concurred.

ON MOTION FOR REHEARING.

BLODGETT, J. In arriving at the conclusion that the motion must be denied, the authorities have not been overlooked which hold that an infant cannot employ an attorney or an agent, or make a valid agreement to compromise his suit (*Biddell v. Dowse*, 6 Barn. & C. 255; *Armitage v. Widoe*, 36 Mich. 124; 2 *Lawson's Rights, Remedies, and Practice*, sec. 824; *Tapley v. McGee*, 6 Ind. 56; *Wainright v. Wilkinson*, 62 Md. 146), or those which hold that the "next friend" of an infant is not his agent or attorney, but an officer of the court, who derives his authority, not from the infant, but from the court: *Guild v. Cranston*, 8 Cush. 506; *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530; *Morgan v. Thorne*, 7 Mees. & W. 400.

However this may be, it must be conceded that rights and remedies are as much the inherent birthright of an infant as of ²²⁸ an adult; and, if this be so, it necessarily follows from his disability to enforce such rights and remedies that the infant must have the right to enforce them through the assistance of another. By what name such other person may be called is immaterial. He may be styled, or may be in fact, the guardian, the parent, or the next friend; but, in the very nature of things, he is, and must be held to be, the representative of the infant, and to have the power to bind him by his proper and lawful acts. Among such acts is that of bringing suit for any cause of action which has accrued in the infant's favor; and, for this purpose, the representative may, in the exercise of an undoubted authority, employ an attorney at law in the management and control of the suit (*Davis v. Merrill*, 47 N. H. 208, 210, 211), which "although attended by a next friend is the suit of the infant": *Bartlett v. Batts*, 14 Ga. 539.

In such a case, the attorney becomes clothed with the ordinary powers pertaining to an attorney of record: *Baltimore etc. R. R.*

Co. v. Fitzpatrick, 36 Md. 619, 628. His authority is as extensive as it is in other cases, and the infant, through his representative, is bound by the attorney's acts within the ordinary scope of his authority the same as an adult would be, and has a like remedy against the attorney for any abuse of such authority, express or implied.

The bringing of a suit in the infant's behalf being rightful, it follows, as a legal consequence, that if judgment is properly rendered against him, he will be concluded by it: *Guild v. Cranstons*, 8 Cush. 506, 509; *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530; for there is no distinction between an infant and an adult with regard to the binding effect of a judgment: *Smith v. McDonald*, 42 Cal. 484; *Ralston v. Lahee*, 8 Iowa, 17, 23, 74 Am. Dec. 291; *Waring v. Reynolds*, 3 B. Mon. 59; *Wills v. Spraggins*, 3 Gratt. 555, 567; *Porter v. Robinson*, 3 A. K. Marsh. 254, 13 Am. Dec. 153; *Albee v. Winterink*, 55 Iowa, 184, 13 Am. Dec. 159, note, 74 Am. Dec. 298, note; 1 *Freeman on Judgments*, 4th ed., sec. 151; 2 *Freeman on Judgments*, sec. 513. "He will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error": 2 *Freeman on Judgments*, sec. 513; and no recognizable distinction is believed to exist between the case of an entry of judgment in regular course by an attorney of a party sui juris and the case of a like entry by an attorney properly employed by the representative of an infant to conduct the suit.

The authority of attorneys of record to make such entries is always presumed, if nothing appears to the contrary, and when made they are conclusive as between the parties, in the absence of fraud or mistake; and we apprehend it makes no difference, practical or legal, whether the agreement of the counsel to make them is expressed orally in open court and the entries are thereupon made upon the records by its order, or whether the agreement ²²⁹ is reduced to writing by the counsel, and duly filed and entered upon the records, without being expressly brought to the court's attention and without obtaining its sanction, which in practice is never refused, and, at most, is but the merest formality. In such a case, the assent of the court is to be presumed.

In our opinion, the law in cases like the present one is correctly stated in *Tripp v. Gifford*, 155 Mass. 109, 31 Am. St. Rep. 530, which recognizes the fact of an extensive practice with regard to the adjustment and settlement of such cases, and in which it is said: "Sometimes, but very rarely, the proposed ar-

rangement is brought to the attention of the court, and its sanction obtained. In most instances, however, the settlement is made and the judgment entered without calling the attention of the presiding justice to it, or obtaining his approval. That such judgments conclude the minor we have no doubt; . . . and even in equity, if a decree is entered against him by consent without special inquiry, he will be bound by the decree."

Motion for rehearing denied.

Smith and Chase, JJ., did not sit; Doe, C. J., dissented; the others concurred.

ATTORNEYS AT LAW—POWER OF, OVER ACTION.—An attorney's general authority will permit him to dismiss or discontinue his client's action: See monographic note to *Clark v. Randall*, 76 Am. Dec. 258, on powers of attorneys at law. See note to *Kirk's Appeal*, 30 Am. Rep. 358, on the authority of an attorney to bind his client. The right of an attorney of record to control and manage an action cannot be questioned by the opposite party while he remains such attorney: *Board of Commrs. v. Younger*, 29 Cal. 147, 87 Am. Dec. 164. An attorney has no right to release his client's judgment without his knowledge or consent: *Kirk's Appeal*, 87 Pa. St. 243, 30 Am. Rep. 357.

FOSTER v. WILLSON.

[68 NEW HAMPSHIRE, 241.]

TRUSTS.—PRECATORY WORDS IN A WILL, equally with direct fiduciary expressions, constitute a trust for the person in whose favor they are used, if, from the whole transaction and the words used, such a trust may be fairly implied.

TRUSTS, PRECATORY—WISH AS TO CARE OF AGED FATHER.—If there is expressed a "wish and desire," in the will of a deceased wife, that her aged, infirm, and dependent father should, in case of need, be provided a home and maintenance by her husband, the intention of the testatrix to provide for the maintenance of her father is apparent, and it must be held that a devise to the husband was made on the trust that he would furnish such maintenance to the father during the latter's life, should he need or require it.

Bill in equity, alleging that Ella H. Willson, daughter of the plaintiff and wife of the defendant, had died, leaving a will, which had been proved; that the defendant had been appointed executor thereof and had accepted the trust; that after the decease of the testatrix, the plaintiff continued to live in the defendant's family for about ten and one-half months, until March 1, 1893; that the plaintiff was eighty-two years old, was

infirm by reason of his advanced age, and required personal care and attention; that by reason of the defendant's neglect and ill-treatment, the plaintiff had been compelled to leave the defendant's family and reside elsewhere; that the plaintiff had no property and no means of support; and that the defendant, since March 1, 1893, had refused to support him, though requested to do so. One portion of Ella H. Willson's will read as follows: "As to my life policy, I give and bequeath one-half the amount which shall be collected on it to my husband, Fred H. Willson, and one-half to my father, Benjamin F. Foster." Another part of the will provided that: "As to the rest, residue, and remainder of my estate, I give, bequeath, and devise the same to my said husband, Fred H. Willson, to have and to hold the same to him and his heirs and assigns forever; but it is my wish and desire that he shall furnish a home, maintenance, and care to and for my said father during life, should he need and require it." The complainant prayed for a decree that a reasonable sum be paid by the defendant for the plaintiff's support, subsequent to March 1, 1893. The bill also prayed for such further sums as might be needed, from time to time, for the plaintiff's support. The making and probate of the will was admitted by the answer, but it denied that the plaintiff had been neglected or ill-treated by the defendant, or that the plaintiff had been compelled to leave the defendant's family by reason of neglect or ill-treatment. The answer averred that the defendant, though under no legal obligation to furnish the plaintiff with a home in his family, had been and was still willing to support and care for him there, but that the plaintiff, without cause, refused to live there. It was further averred in the answer that, by the terms of the will, the defendant was not legally or equitably bound to support or provide for the plaintiff in his family or elsewhere; and the defendant insisted upon this as a special matter of defense, claiming the same benefit therefrom as if he had interposed a demurrer.

Don H. Woodward, for the plaintiff.

Batchelder & Faulkner, for the defendant.

242 **BLODGETT, J.** The intention of the testatrix to provide for the maintenance of her father being sufficiently apparent from the will itself, it is the duty of the court to effectuate it by regarding the defendant as trustee for the father, if, from the whole transaction and the words used, such a trust may be fairly implied.

In determining this question, it is to be borne in mind that there is no uncertainty as to the subject or object of the testatrix's expression of her wish and desire; and that precatory words in a will, equally with direct fiduciary expressions, will constitute a trust. "Technical language is not necessary to constitute a trust. It is enough if such intention is apparent. Thus, words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for those persons in favor of whom such expressions are used, provided that from the construction of the whole will such was the apparent intention of the testator, and provided he has pointed out with sufficient clearness and certainty both the subject matter and the object of the trust": 1 Perry on Trusts, 3d ed., sec. 114, note; 1 Jarman on Wills, 5th Am. ed., 680; Erickson v. Willard, 1 N. H. 217, 229. "The criticisms which have been sometimes applied to this rule by textwriters and in judicial opinions will be found to rest mainly on its application in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction": Warner v. Bates, 98 Mass. 274, 277, per Bigelow, C. J.

The only element of uncertainty then is, whether the maintenance of the testatrix's father was intended by her to be executed by her husband as a trust. That is to say, did the testatrix ²⁴³ intend to impose an obligation on her husband to carry her wish and desire as to her father's maintenance into effect, or, having expressed her wish and desire, did she intend to leave it to him to comply with them or not at his discretion? From the nature of the case, no certain answer can be given; but upon the established rule of testamentary construction in this state, as well as in accordance with the general rule where like words have been used by testators (Harrison v. Harrison, 44 Am. Dec. 372-379, note), and with a plain moral duty on the part of the defendant, we are of opinion that the clause of the will which is the subject of the present controversy does not leave the maintenance of the plaintiff to the discretion of the defendant, to be afforded or withheld at his pleasure, but that the devise to him was made on the trust that he should furnish such maintenance during the plaintiff's life, should he need and require it, which the bill charges and the demurrer admits.

"The wish of a testator, like the request of a sovereign, is equivalent to a command": 1 Hill on Trustees, 73; 1 Perry on Trusts, sec. 121, note; and especially should it be so held in a case like the present, where it would seem that even the slight-

est wish of a deceased wife as to the care of her aged, infirm, and dependent father ought of itself to be sufficiently binding on the defendant's conscience.

The question whether the maintenance of the plaintiff shall be in the defendant's family or elsewhere will be determined at the trial term.

Demurrer overruled.

All concurred.

PRECATORY TRUSTS — WHEN CREATED.—In determining whether a precatory trust is raised by a will, the essential point is whether, looking at the whole contents of the instrument, it should be inferred that the testator intended to impose an obligation on his devisees or legatees to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to them to carry out such wishes, or not, at their discretion: *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699.

DAVIS v. SMITH.

[68 NEW HAMPSHIRE, 253.]

CONTRACT TO PREVENT CRIMINAL PROSECUTION IS VOID.—Instruments executed by a married woman, such as a promissory note, with a mortgage on real estate to secure it, and a chattel mortgage upon her household furniture and other personal property, the sole consideration of which is to prevent a criminal prosecution against her husband, are void.

Bill in equity, to enjoin the defendant from further prosecuting a suit for foreclosure on real estate mortgaged to him by the plaintiff, and from removing, selling, or in any way interfering with certain personal property described in a chattel mortgage from the plaintiff to the defendant. The bill also prayed that the defendant be commanded to cancel and surrender the mortgages and the note secured by them.

Burleigh & Adams, for the plaintiff.

Alvin F. Wentworth and Jewell & Stone, for the defendant.

253 SMITH, J. There was an admitted deficit in the treasury of the Pemigewasset Mutual Relief Association of six thousand one hundred and sixteen dollars and twenty cents. Davis, the president, Smith, the treasurer, and Story, the secretary, promised the insurance commissioner to pay that sum to him, and did pay it, in trust for the claimants against the association.

The money was raised by Smith and Story, who strenuously insisted that Davis should contribute his proportionate share. He had no property and was unable to contribute anything. Smith and Story applied to the plaintiff, wife of the president of the association, and emphatically gave her to understand that she must assist them. All the officers understood that criminal proceedings would be instituted against them unless the demands of the commissioner for a further payment of three thousand dollars to cover an alleged deficit were speedily complied with. They so informed the plaintiff, and she so believed. Under these circumstances, she executed and delivered to the defendant her promissory note for fifteen hundred dollars, a mortgage of certain lands in Campton, and a chattel mortgage of her household furniture and other personal property. In executing the note and mortgages, she was actuated solely by the belief that otherwise her husband would have to meet a criminal prosecution.

The note and mortgages given under such circumstances cannot be deemed valid and binding. It was decided in *Armstrong v. Toler*, 11 Wheat. 258, that if a promise is entirely disconnected with the illegal act and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver ²⁵⁴ and conductor of the illegal act. In this case, however, the sole consideration for the note was the plaintiff's fear of a criminal prosecution against her husband, induced by the representations made by the defendant for the express purpose of obtaining it. It was given in expectation of and for the purpose of preventing such prosecution, and is void: *Richardson v. Duncan*, 3 N. H. 508; *Plumer v. Smith*, 5 N. H. 553, 22 Am. Dec. 478; *Severance v. Kimball*, 8 N. H. 386; *Shaw v. Spooner*, 9 N. H. 197, 32 Am. Dec. 348; *Alexander v. Pierce*, 10 N. H. 494; *Clark v. Pease*, 41 N. H. 414; *Merrill v. Carr*, 60 N. H. 114; *Bank v. Buzzell*, 61 N. H. 612; *Proctor v. Lane*, 62 N. H. 457. A party who pays money under duress may recover it back: *Richardson v. Duncan*, 3 N. H. 508.

Decree for the plaintiff.

Blodgett, J., did not sit; the others concurred.

CONTRACTS—INTERFERING WITH ENFORCEMENT OF LAWS—VALIDITY.—Contracts having for their subject matter any interference with the due enforcement of the laws are against public policy, and are therefore void: *Note to Bowman v. Phillips*, 13 Am. St. Rep. 297. A contract is wholly void if any part of the

consideration thereof is the suppressing of a criminal prosecution: *Pearce v. Wilson*, 111 Pa. St. 14, 56 Am. Rep. 243; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684; *Woodruff v. Hinman*, 11 Vt. 592, 84 Am. Dec. 712.

GROSS v. PORTSMOUTH.

[68 NEW HAMPSHIRE, 266.]

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF INDEPENDENT PERSONS.—A city is not answerable for injuries caused by the negligent construction of waterworks therein, by an independent board of water commissioners, who are not the city's servants or agents, and whom the city cannot direct or control in the discharge of their duties.

MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF AGENTS, WHICH THE CITY HAS NO POWER TO AUTHORIZE. A city is not answerable, even for the acts of its agents or servants, or for their negligence, in the performance of acts which it has no power to authorize.

Case. The declaration set forth that the defendant, a municipal corporation, was the owner of a system of waterworks; that, by pipes laid in the ground, it conducted water to the dwellings of residents in the city, for which it received compensation; that in laying the pipes, in 1894, on Market street, its servants so carelessly and negligently filled the trenches in which the pipes were laid as to form a ridge in the street, making the highway defective and dangerous; and that the plaintiff, while driving on the street, by reason of the ridge, was thrown from her carriage and injured. The defendant demurred.

Samuel W. Emery, for the plaintiff.

Ernest L. Guptill and Calvin Page, for the defendants.

266 **CARPENTER, J.** Unless the defendants are liable at common law the demurrer must be sustained: *Laws* 1893, c. 59. Judicial notice may be taken of the act (*Laws* 1891, c. 209) authorizing the defendants "to issue water bonds, and to manage and control its water supply": *Hall v. Brown*, 58 N. H. 93, 95, 96. By its provisions the "immediate management and direction of the waterworks" are vested in a board of water commissioners consisting of four persons, of whom the mayor for the time being is ex officio one. The three other members of **267** the board (one of them to hold the office three years, one four

years, and the other five years from February 1, 1891) are named in the act. In January, 1894, and each year thereafter, the mayor and aldermen are required to appoint a member of the board to hold the office three years from the first day of the following February. They may "appoint a superintendent of the works and such other agents and servants as they may deem necessary, and may fix their compensation. They may make such rules and regulations for their own government and in relation to all officers and agents appointed by them as they may deem proper. They shall have the control and management of the construction and enlargement of said works, and may make all such contracts and agreements for and on behalf of the city in relation thereto as they may deem proper and advisable, and shall have full charge and control over the said works when enlarged and constructed. They shall establish rates and tolls, and prescribe rules and regulations for the use of water, and may sell and dispose of such articles of personal property connected with said works as they shall deem expedient, and may purchase such property as may be in their judgment necessary for said works and the purposes contemplated by this act": Laws 1891, c. 209, secs. 4-6, 8.

The water commissioners are not the city's agents, but an independent board. The city cannot direct or control them in the discharge of their duties. They have exclusive authority to determine where and in what manner water-pipes shall be laid, and to do all other things touching the construction, maintenance, and management of the waterworks. For their misfeasance or that of their employés the defendants are not liable, because they are not the defendants' servants: *Ball v. Winchester*, 32 N. H. 435; *Edgerly v. Concord*, 62 N. H. 8, 20, 13 Am. St. Rep. 533; *Walcott v. Swampscott*, 1 Allen, 101; *Morrison v. Lawrence*, 98 Mass. 219, 221; *Ham v. Mayor*, 70 N. Y. 459.

The defendants have no authority, and can confer none upon their officers and agents, to do any act relating to the construction or management of the works. Their ordinance authorizing or directing their servants to lay water-pipes in Market street or elsewhere, or prescribing the manner of laying them, would be illegal and void. At common law, a municipal corporation is not responsible for the acts of its agents or servants, or for their negligence in the performance of acts that it has no power to authorize: *Edgerly v. Concord*, 62 N. H. 8, 19, 13 Am. St. Rep. 533; *Anthony v. Adams*, 1 Met. 284; *Lemon v. Newton*, 134 Mass. 476; *McCarthy v. Boston*, 135 Mass. 197, 200, 201; *Smith*

v. Rochester, 76 N. Y. 506; 2 Dillon on Municipal Corporations, sec. 766; Cooley on Torts, 119. Whether the acts of which the plaintiff complains were done by the water commissioners or the defendants' servants, the declaration discloses ²⁶⁸ no cause of action, and the demurrer must be sustained. The question whether the demurrer might be sustained upon another ground urged by the defendants (Laws 1893, c. 59, sec. 1) is not considered.

Demurrer sustained.

All concurred.

MUNICIPAL CORPORATIONS—LIABILITY—INDEPENDENT OFFICER—UNAUTHORIZED ACTS.—A city is not answerable for the wrongful acts or negligence of an independent public officer: *Caspary v. Portland*, 19 Or. 496, 20 Am. St. Rep. 842. See, also, *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442. Neither is it liable for an injury resulting from an act done by its officers, which it had no power to authorize: See monographic note to *Hillsdorf v. St. Louis*, 100 Am. Dec. 358, on the liability of a city for the unauthorized acts of its officers. Compare monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376.

FOWLER v. OWEN.

[68 NEW HAMPSHIRE, 270.]

TRESPASS—DAMAGES—PRIOR ACTION.—At common law, after a party obtains judgment in ejectment, he may maintain trespass for mesne profits and recover, as a part of the damages, the costs necessarily incurred in the action of ejectment.

TRESPASS—DAMAGES—NECESSARY EXPENSES OF FORMER SUIT.—A plaintiff, in an action of trespass quare clausum, is entitled to recover costs and expenses necessarily incurred and actually paid by him in a former action to regain possession of the land, without regard to the form of the action; and it is immaterial that the plaintiff's preliminary proceedings were in equity instead of law.

ACTIONS—FORM—IMMATERIALITY OF.—Time spent in considering the form of a remedy is wasted where the plaintiff may, at any time, file a bill in equity as an amendment.

TRESPASS—COMPETENT EVIDENCE.—Evidence that a defendant, in an action of trespass quare clausum, defended a former action brought by the plaintiff against a third party to recover the premises, is competent as tending to show that the acts of trespass were committed by his procurement and under his authority.

TRESPASS—JOINT LIABILITY.—If acts of trespass are committed by one person under the procurement or authority of another, both are jointly and severally liable.

TRESPASS—BAR TO ACTION—UNSATISFIED JUDGMENT.—When two persons are jointly and severally answerable

for a trespass, an unsatisfied judgment against one is no bar to the plaintiff's right to recover damages against the other in a subsequent action of trespass quare clausum.

TRESPASS—EVIDENCE PROPERLY EXCLUDED.—An intruder upon the title of the state may maintain trespass against a stranger. Hence, where the defendant makes no claim to a right of possession under the state, evidence that the title is in the state, and not in the plaintiff, is properly excluded.

Trespass quare clausum to recover damages for acts done January 1, 1887, and on divers days between that day and the date of the writ, March 19, 1892, and to recover expenses incurred in regaining possession of the land from the defendant and his tenants and servants. Evidence was received, subject to the defendant's exception, which tended to show that, in 1890, the plaintiff recovered judgment in an action of trespass against Asa Beckman for building a house upon the premises; that Owen, who claimed to own the premises and who claimed that Beckman was his tenant, defended the action; that the question of title was the only one tried; that the judgment had not been satisfied; that as Owen and Beckman retained possession notwithstanding the judgment, the plaintiff filed a bill in equity against them, praying for an injunction to restrain them from committing further trespasses, and to compel them to leave the premises; that the bill was taken pro confesso, and a decree made enjoining the defendants to leave forthwith, to desist from committing further trespasses upon it, and ordering that a writ of possession be issued against them; that copies of the decree were given to them and a writ of possession issued, by virtue of which an attempt was made to put the plaintiff in possession, but without success; that in a subsequent proceeding against Owen, Beckman, and another, for violating the injunction, it was found that they were guilty of contempt; and that, as a result of all these proceedings, the plaintiff got possession of the premises in 1891: See *Fowler v. Beckman*, 66 N. H. 424. Subject to the defendant's exception, it was ruled that the plaintiff was entitled to recover the expenses necessarily incurred and actually paid by him in the equity suit and in the proceeding for violating the injunction. Evidence was offered, on the defendant's part, to show that, in 1742, the title to the premises was in the province of New Hampshire; and that it had ever since been in the province and the state; but this evidence, subject to the defendant's exception, was excluded.

Samuel H. Goodall and John S. H. Frink, for the plaintiff.

Samuel W. Emery, for the defendant.

271 CHASE, J. At common law, after a party obtains judgment in ejectment he may maintain trespass for mesne profits and recover, as a part of the damages, the costs necessarily incurred in the action of ejectment: 1 Chitty on Pleading *192, *196; 2 Chitty on Pleading, *870; *Aslin v. Parkin*, 2 Burr. 665; *Nowell v. Roake*, 7 Barn. & C. 404; *Symonds v. Page*, 1 Crompt. & J. 29; *Baron v. Abeel*, 3 Johns. 481, 3 Am. Dec. 515. In *Nowell v. Roake*, 7 Barn. & C. 404, a judgment recovered by the defendant in ejectment was reversed upon a writ of error, and it was held that the costs in the writ of error, taxed as between attorney and client, were recoverable as a part of the damages in the action for mesne profits. Lord Tenterden, C. J., said: "The expenses incurred in the court of error were part of the damages sustained by the plaintiff, by reason of his having been wrongfully kept out of possession by the act of the defendant."

The right to recover the expenses of the former action depends upon the necessity for the action and not upon its particular form. It is immaterial that the plaintiff's preliminary proceedings were in equity instead of law. The necessary consequence of the defendant's acts was to compel the plaintiff to resort to an equitable or legal action in order to obtain his rights.

It is suggested that there may be cases in which the costs of the previous proceedings may have been, in part at least, unnecessarily incurred and due to the plaintiff's folly, and in which such a balancing and adjustment of the consequences of wrong are required as can be done only in equity, and hence that the remedy is by bill in equity instead of an action at law. Under the practice in this state, time spent in the consideration of the form of remedy is wasted: *Peaslee v. Dudley*, 63 N. H. 220; *Gage v. Gage*, 66 N. H. 282, 296. The plaintiff may, at any time, file a bill in equity as an amendment.

The evidence that Owen defended the plaintiff's action against Beckman was competent. Whatever Beckman did by the procurement of Owen or under his authority was Owen's act as well as Beckman's. For such acts they were jointly and severally liable. The plaintiff was at liberty to sue either of them separately. The unsatisfied judgment against Beckman is no bar to the plaintiff's right to recover in this action: *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140.

272 The testimony offered by the defendant, that the title to the land was in the state and not in the plaintiff, was properly excluded. The defendant made no claim to a right of possession

under the state. The plaintiff's possession was sufficient to enable him to maintain the action against one showing no better right, even if the state had the title: *Bailey v. March*, 2 N. H. 522; 3 N. H. 274; *Locke v. Whitney*, 63 N. H. 597; *Colbath v. Anderson*, 63 N. H. 617; *Sweetland v. Stetson*, 115 Mass. 49; *Nickerson v. Thacher*, 146 Mass. 609; *Jackson on Real Actions*, 157; 1 *Chitty on Pleading*, *176. An intruder upon the crown may maintain trespass against a stranger: *Harper v. Charlesworth*, 4 Barn. & C. 574.

Upon the plaintiff's filing a bill in equity, there will be judgment upon the verdict.

Clark and Carpenter, JJ., did not sit; the others concurred.

TRESPASS.—DAMAGES FOR MESNE PROFITS may be recovered in trespass, as well as the possession: *White v. Saint Guirons, Minor*, 331, 12 Am. Dec. 56.

TRESPASS—ACTIONS FOR JOINT—SATISFACTION.—In case of a joint trespass there may be separate actions and satisfaction of the separate costs, but only one satisfaction of damages: *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689. See, also, *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711.

LANE v. HILL.

[68 NEW HAMPSHIRE. 275.]

A WILL IS NOT REVOKED BY A SUBSEQUENT ONE, which is not produced when the first will is offered for probate, unless the contents of the subsequent will can be ascertained, and are inconsistent with the former will, or expressly revoke its provisions.

WILLS—PROBATE OF—ISSUES—WHEN IMMATERIAL—PRESENTING QUESTION OF REVOCATION.—An issue that an instrument offered for probate was not the last will of the testator is immaterial, where it merely submits the question whether, after the execution of the will propounded, the testator had executed another will; and, for the purpose of submitting the question of revocation, such an issue is not properly framed.

PLEADING—ISSUE—WHEN OBJECTIONABLE.—An issue which does not clearly submit some particular question of fact to the jury is objectionable. Thus, upon the question as to whether a disputed paper is, or is not, the last will of a deceased person, the whole question should not be submitted to the jury, but the issue should require the determination of some fact, the existence or non-existence of which is material upon the legal question involved.

TRIAL—OBJECTION TO EVIDENCE—WAIVER.—A party waives his right to object that the evidence produced by his adversary is insufficient to justify a verdict in the latter's favor by suffering the case to go to the jury without objection.

EVIDENCE—PAROL PROOF OF CONTENTS OF LOST WILL.—Upon proof that a will has been lost, its contents may be shown by parol in the same way as the contents of any other lost instrument.

EVIDENCE—PAROL PROOF TO ESTABLISH REVOCATION OF WILL.—Parol evidence of the contents of a subsequent will which has been lost, destroyed, or canceled is admissible to establish the revocation of a prior will which has continued in existence.

WILLS—TESTATOR'S DECLARATIONS AS TO CONTENTS OF LOST WILL—REVOCATION.—When a will is offered for probate, and there is evidence of the due execution of a later will, and its loss, the testator's declarations as to the contents of the last will are admissible, in connection with, and in corroboration of, such evidence, to prove its contents, and establish the revocation of the will offered for probate, but the express revocation of a will, or the execution of another will revoking the former, cannot be shown by declarations of the testator alone.

WILLS—REVOCATION—PROOF OF, BY CONTENTS OF LOST WILL.—The revocation of a prior will may be shown by competent evidence of the contents of a subsequent will which, though lost, is found to be inconsistent with the earlier will.

WILLS—EXECUTION OF.—THE DECLARATIONS of a testator are not, of themselves, sufficient to prove the due execution of his will.

WILLS—QUESTION OF FACT.—Whether a will was in existence at the date of the testator's death, or not, is a question of fact.

WILLS—REVOCATION OF, BY DESTRUCTION—PRESUMPTION.—Upon a showing that a will was, at one time, executed, that it afterward remained in the testator's possession, or was last heard of in his custody, but that at his death it could not be found, the presumption is that it was destroyed by him, *animo revocandi*; but, if the will is not shown to have been in the testator's possession, the failure to find it after his death furnishes no ground for a presumption of revocation.

WILLS.—THE DESTRUCTION OF A SECOND WILL DOES NOT REVIVE THE FIRST without evidence that such was the intention of the testator, especially if the later will contained a clause of revocation.

Appeal from the probate of the will of George W. Lane. At the trial three issues were presented. The first issue was that the instrument offered for probate was not the last will of the testator. The second and third issues raised the question of the due execution of the will. The testimony of Mrs. Felch, as shown in the opinion, tended to show the execution of a second will, but the evidence did not disclose the name of the third witness, which Mrs. Felch could not remember, the contents of the second will, its existence at the time of the testator's decease, or whether it revoked the first will. The defendant offered to prove the testator's declarations, made a few months before his death, that he had made a will, written by Fred R. Felch, in which he had provided well for his wife, and had given the farm and some money to his daughter. This evidence was

excluded and the defendant excepted. The instrument offered for probate gave all of the testator's property to his wife, and was written by Jesse B. Pattee. The plaintiff then moved for a judgment on the verdict, establishing the will on the second and third issues, upon two grounds: 1. That all the evidence introduced and offered by the defendant to prove the existence and due execution of a second will revoking the first was insufficient in law for that purpose; 2. That if a second will was made which revoked the first, it must be shown that it existed at the time of the testator's death.

Greenleaf K. Bartlett and Henry B. Atherton, for the plaintiff.

Eastman, Young & O'Neill, for the defendant.

276 PARSONS, J. Three issues were submitted to the jury. Upon two the jury found for the plaintiff, in substance, that the will was duly executed by the testator, George W. Lane. To this verdict and the evidence upon which it is founded there is no **277** exception. Upon the first issue, that the will probated and allowed by the probate court was not the last will and testament of George W. Lane, the jury were unable to agree. The plaintiff moves for judgment on the ground that all evidence introduced and offered by the defendant to prove this issue was insufficient in law for that purpose. If the first issue is understood as submitting to the jury for their finding merely the question whether, after the execution of the will propounded, the testator had executed another will, the issue is an immaterial one.

"A subsequent will does not revoke a former one unless it contains a clause of revocation, or is inconsistent with it. And where it is inconsistent with the former will in some of its provisions merely, it is only a revocation pro tanto: *Brant v. Wilson*, 8 Cow. 56. Where a subsequent will is made, and there is no proof that it contained any clause revoking a former will, as in cases where the contents of the last will cannot be ascertained, it is not a revocation of the former will. This was decided by the court of king's bench in England more than one hundred and fifty years since, in the case of *Hutchins v. Basset*, Comb. 90, 3 Mod. 203; and that decision was subsequently affirmed, upon a writ of error, in the house of lords: See *Hungerford v. Nosworthy*, Show. Parl. C. 146. In the subsequent case of *Harwood v. Goodright*, Cowp. 87, which came before the court of

king's bench in 1774, it was held that a former will was not revoked by a subsequent one, the contents of which could not be ascertained; although it was found by a special verdict that the disposition which the testator made of his property by the last will was different from that made by the first will, but in what particulars the jurors could not ascertain. This case was also carried to the house of lords upon a writ of error; and the judgment of the court of king's bench was affirmed. As these two decisions of the court of dernier ressort in England were previous to the Revolution, they conclusively settle the law on the subject here": *Nelson v. McGiffert*, 3 Barb. Ch. 158, 164, 165, 49 Am. Dec. 170; 1 Redfield on Wills, 1st ed., 350; 1 Jarman on Wills, 338 (*172); *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322.

A verdict of the jury, therefore, establishing as a fact that the testator executed another will after the execution of the will from whose probate the appeal was taken, without more, would not defeat the executor's right to a judgment establishing this will. She would be, therefore, equally entitled to such judgment where no verdict has been rendered. Her right to a judgment would not be defeated by the failure of the jury to render any verdict when a verdict against her would not have that effect.

On an appeal from the probate court, "if any fact material to the cause be disputed, the court may direct an issue proper to try such fact to be framed, and ascertain the same by the verdict ²⁷⁸ of a jury": Pub. Stats., c. 200, sec. 11. The first issue in this case is objectionable, in that it does not clearly submit some particular question of fact to the jury. The judgment to be rendered is whether the instrument propounded is or is not the last will and testament of the deceased. The issue framed in this case apparently submits the whole question to the jury, whereas the issue should require the determination of some fact, the existence or nonexistence of which is material upon the legal question whether the disputed paper is or is not the last will of the deceased: Rules of Court, p. 31, 56 N. H. 601.

In making the issue, the executors move that the will be proved and allowed as and for the last will and testament, etc. This motion is addressed to the court, not the jury. The objecting party then sets up any facts which are the grounds of his claim that the instrument is not the last will, etc. If the facts are material, that is, facts from which, if established, it would follow as matter of law that the instrument is not the testator's

last will, an issue is awarded him and judgment rendered as the fact is found. But the whole question is not properly to be thrown to the jury in this manner: *Dudley v. Wardner*, 41 Vt. 59. The parties in the present case, however, appear to have treated the issue as if it had been that since the execution of this instrument the testator duly executed another will, by the terms of which the first was revoked; or, more briefly, that the will was revoked by the testator in his lifetime. Upon this issue no will was produced. There was evidence, however, tending to show the execution of another will, but no evidence was admitted in the case of the contents of the second will. There being no evidence in the case that Lane had executed a subsequent will revoking in terms or by its inconsistent provisions the will whose validity was litigated, there was nothing to submit to the jury upon the first issue, considering it as the parties appear to have treated it. Upon motion of the plaintiff, made before the case was submitted to the jury, that issue would have been withdrawn; but, having suffered the case to go to the jury upon this issue without objection, her motion comes too late after the failure to find a verdict: *Baldwin v. Wentworth*, 67 N. H. 408; *Haydock v. Salvage*, 67 N. H. 598. Had the motion been seasonably made and the defendant's attention thereby called to the lack of evidence, it might have been that justice would have rendered it necessary that the case should have been reopened to allow the defendant to supply any missing testimony. However that may be, the plaintiff allowed the case to be submitted to the jury without objection to the want of evidence; and the jury having rendered no verdict, the question of revocation when the issue is properly framed is still undetermined, and there can be no judgment either way until the question of fact is settled.

²⁷⁹ There is no occasion for the defendant's motion for a new trial. Until the issue is decided, she is entitled to as many trials as may be necessary, assuming that upon a new trial sufficient evidence will be offered to warrant a verdict by the jury.

Evidence of declarations of the testator that he had made a second will, and as to its contents, was offered and excluded. The plaintiff claims that all the evidence introduced and offered by the defendant to prove the existence and due execution of a will revoking the first will was insufficient for that purpose. If it were conceded that the case contains all the evidence that can be adduced upon these questions, we might, treating the statement as an agreed case, pass thereon; but in view of the fact that the defendant claims to have additional evidence to intro-

duce upon a subsequent trial, it does not seem advisable to consider this question until the evidence is all before us.

The question of the admissibility of the testator's declarations that he had made a second will, and as to its contents, will arise at another trial, and we have considered it. The testimony of Mrs. Felch, as stated in the case, "tended to show the execution of a will by the testator of a subsequent date to the one offered for probate, to which she was one witness, her husband, Fred R. Felch, now deceased, who wrote the will, was a second, and there was a third witness whom she did not remember." This evidence would seem to be sufficient, *prima facie* at least, for the submission to the jury of the question whether the deceased did in fact execute a second will, and is so held in *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395; but, in view of the suggestion of counsel as to newly discovered evidence, this question may not arise upon another trial. Evidence having been given of the due execution of a will and its loss, one question is whether declarations of the testator are admissible to show the contents of the will. The loss of the will being shown, its contents may be shown by parol in the same way as proof of the contents of any other lost instrument: *Brown v. Brown*, 8 El. & B. 875; 92 Eng. Com. L. 889, and note. In like manner, in order to establish the revocation of a prior will which has continued in existence, proof of the contents of a subsequent will which has been lost, destroyed, or canceled, is admissible: *Brown v. Brown*, 8 El. & B. 875; 92 Eng. Com. L. 889, and authorities cited.

The question whether declarations of the testator are admissible to prove the contents of a lost will has been most thoroughly examined in the case of *Sugden v. St. Leonards*, L. R. 1 P. D. 154, which was approved in *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322, and the conclusion reached was in favor of their admissibility. In the first case, in the discussion it is said by Jessel, M. R.: "Now, it might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they ²⁸⁰ were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule, the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only ob-

tainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule. . . . The exceptions are generally considered to be three principal and three subordinate exceptions: . . . 1. There is an exception of a declaration accompanying an act: 2. Of a declaration against interest; and 3. Of a declaration made by a person in the course of business, one which it was his duty to make. Those are three large exceptions. There are then some smaller exceptions; the first is the proof of matters of public and general interest, one might say of quasi historical interest, not actually historical, where we admit the declarations of persons who may, from their position, be fairly presumed to have had knowledge on the subject. In the next place, we admit evidence which is in its nature very weak indeed, that is, in matters of pedigree, where we admit declarations of deceased members of a family, on its being shown that the persons were members of the family. Now, I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place, the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases. Now, all these reasons exist in testifying both as to matters of public and general interest, and as to matters of pedigree, and some, if not all of them, exist in the other cases to which I have referred. They all exist in the case of a testator declaring the contents of his will. Of course, as in the case of pedigree, the courts must be cautious in admitting such evidence. From its very nature it is evidence not open to the test of cross-examination, it is very often produced at second or third hand, and it is therefore particularly liable to lose something of its color in the course of transmission. It is so easily and so frequently fabricated that ²⁸¹ all courts which have to dispose of such cases must be especially on their guard. But that goes only to the question of the weight to be attributed to the evidence when admitted; it does not go to the question of admitting the evidence

itself; and I must say it appears to me that, having regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong; not to hold out to the world that any man who is able to get hold of the will of a testator which may disappoint him of his expectations, just or unjust, if he once destroys it, shall be able to acquire the property either for himself or for those whom he wishes to benefit—I say if ever there was such a case it is the case of a lost will. The court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration.” In this case, in 1876, the written and oral declarations made by a testator, both before and after the execution of his will, the will being lost, were, after extended discussion and the greatest consideration, held admissible as secondary evidence of its contents. The arguments advanced by Jessel, M. R., and Cockburn, C. J., have not been answered, and they seem to us unanswerable.

The objection to the evidence is that it is hearsay, not open to cross-examination, and not given under the sanction of an oath. The declaration, however, is that of a person now deceased, having the means of knowledge without interest to misrepresent, and is the best evidence of which the case is capable: *Betts v. Jackson*, 6 Wend. 173. It is difficult to see on what ground the reason of the admission of the evidence of declarations of deceased persons in cases of disputed boundary, which is put upon the ground that it is the best evidence of which the case is capable, does not apply to cases like the present: *Lawrence v. Tennant*, 64 N. H. 532; *Nutter v. Tucker*, 67 N. H. 185, 68 Am. St. Rep. 647. To admit the declaration of a deceased person in one class of cases because it is the best evidence of which the case is capable, permitting the jury to judge of the interest of the declarant as bearing upon the weight of his testimony (*Lawrence v. Tennant*, 64 N. H. 532), and to exclude the declaration of the deceased person in this case, would be to establish a particular rule of evidence for a special class of cases, for

which no good reason can be given. Our conclusion ²⁸² is, that the evidence of the deceased's declarations as to the contents of the last will is admissible to show its contents, and, if the will is thereby found inconsistent with the earlier will, to show the revocation of the prior will: *Gage v. Gage*, 12 N. H. 371, 381.

Whether the declarations of a testator are admissible to prove the due execution of his will is another and different question. The great weight of authority is to the effect that such declarations are not of themselves sufficient: *Hoitt v. Hoitt*, 63 N. H. 475, 499, 500, 56 Am. Rep. 530, and cases cited; 1 *Redfield on Wills*, 555; 1 *Jarman on Wills*, 245. The reason of the rule is, that "the exercise of the testamentary power being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the exercise of the right": *Sugden v. St. Leonards*, L. R. 1 P. D. 154. "Mere vague declarations of testators that they have made their wills are not always to be implicitly relied on. . . . In common parlance, a man may well say that he has made a will when he has written a testamentary paper, though unfinished": 1 *Jarman on Wills*, 245, 246. Upon the authorities, it is clear that the express revocation of a will, or the execution of another will revoking the former, cannot be shown by declarations of the testator alone. That, however, is not the question in this case, which is whether, when there is evidence competent for the jury upon the question of due execution and from which they may properly find such execution, the inference of fact upon this issue from the facts already admitted can be strengthened by evidence of declarations of the testator, verbal or written, or of his conduct and acts tending to establish the point in issue. All the considerations of necessity that have been suggested with reference to proof of the contents of a lost will may apply with equal force to the admission of this evidence. If the issue were whether a will duly executed were a forged or genuine will, and the evidence were evenly balanced, would not evidence that the supposed will remained in the testator's possession, that he was seen to examine it, that he spoke of it as his will, be of the highest moral convincing force in favor of the will? No logical reason appears why such should not be legal evidence. The admission of such evidence should be confined to the corroboration of direct evidence of execution, for the reason that otherwise the evidence is but proof of the testator's understanding,

and the testator's understanding cannot take the place of the formalities prescribed by law: *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530. Upon these considerations we think the testator's statement that he had made a will which was written by Fred R. Felch was admissible in corroboration of the testimony of Mrs. Felch to the same effect, and should have been received. The plaintiff also moves for judgment on ²⁸³ the ground that the existence of the second will at the testator's death is not shown, even if the proof were sufficient to establish its execution. No question such as is raised by this motion appears to have been submitted to the jury, unless it is embraced in the view the parties appear to have taken of the first issue. Whether the will was in existence at the testator's death, or not, is a question of fact. If that fact is one included in the issue whether the first will was revoked, the motion comes too late, on the grounds heretofore stated. It seems well settled that where a will is proved to have been once duly executed, to have remained afterward in the testator's possession, or was last heard of in his custody, but at his death cannot be found, the presumption is that it was destroyed by him *animo revocandi*: 2 Greenleaf on Evidence, sec. 681; 1 Redfield on Wills, sec. 48, p. 329; *Betts v. Jackson*, 6 Wend. 173; *Brown v. Brown*, 8 El. & B. 875, and authorities in note, 92 Eng. Com. L. 889. If the will is not shown into the testator's possession, the failure to find it after his death furnishes no ground for a presumption of revocation: 1 Greenleaf on Evidence, sec. 681. Whether the second will was destroyed is important so far as the probate of the present will is concerned, only if the effect of such cancellation of the second will would be to revive the first. Although upon this point the authorities are in conflict, the better opinion seems to be that, even in the absence of statute provisions upon the subject such destruction would not have that effect without evidence that such was the intention of the testator, especially if the later will contained a clause of revocation (*Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499; 2 Greenleaf on Evidence, sec. 683), which, in view of the fact that there is no evidence upon these points, is as far as it is necessary for us to go at present. Whether, as a matter of convenience and for the purpose of settling the entire controversy by one trial, the defendant, if she relies upon the second will, ought not to proceed in the probate court for probate of the second will, so that upon appeal to this court the whole controversy could be passed upon by one jury,

is a matter for the consideration of counsel, and which, if they do not agree, can be determined at the trial term.

Case discharged.

Wallace, J., did not sit; the others concurred.

WILLS—REVOCATION—SUBSEQUENT WILL.—The revocation of a will by a subsequent will does not take place unless the second will contains a clause of revocation, or is wholly inconsistent with the former will. If partly inconsistent, it is a revocation pro tanto only. And where the execution of the subsequent will is proved, but not its contents, the former will is not revoked: Note to Marsh v. Marsh, 64 Am. Dec. 600. But the revocation of a will may be established by proving a subsequent will containing a clause revoking all former wills, although the later will has been lost or destroyed, and no part of its contents, other than the clause of revocation, can be proved: In re Cunningham, 38 Minn. 169, 8 Am. St. Rep. 650.

WILLS, LOST OR DESTROYED—PROBATE OF.—A will, lost or destroyed previous to the testator's death, may, if unrevoked, be established by parol evidence of its execution and contents, and admitted to probate, although not in express terms authorized by the statute: but it is incumbent upon those who seek to establish the will to prove its due execution, and to rebut the presumption of cancellation arising from the fact that it cannot be found at the testator's death: Tynan v. Paschal, 27 Tex. 286, 84 Am. Dec. 619, and monographic note thereto on the probate of lost or destroyed wills. Compare Voorhees v. Voorhees, 39 N. Y. 463, 100 Am. Dec. 458; Kitchens v. Kitchens, 39 Ga. 168, 99 Am. Dec. 453.

WILLS—REVOCATION—DECLARATIONS OF TESTATOR. The revocation of wills cannot be established by parol evidence alone: Hise v. Fincher, 10 Ired. 139, 51 Am. Dec. 383; and the testator's declarations are not admissible in evidence as evidence of a revocation unless connected with some revocatory act, and tending to show that its purpose was or was not revocatory: See monographic note to Graham v. Burch, 28 Am. St. Rep. 361, on the revocation of wills.

WILLS—REVOCATION—PRESUMPTION.—A will is presumed to have been destroyed, with intent to revoke it, from proof that it cannot be found after the testator's death: Collyer v. Collyer, 110 N. Y. 481, 6 Am. St. Rep. 405. See, also, the note to Graham v. Burch, 28 Am. St. Rep. 347.

WILLS—DESTRUCTION—REVIVOR.—A will is not revoked by the subsequent execution of another will containing no express clause of revocation, and the destruction of the latter will, therefore, revive the former and leave it in full force: Cheever v. North, 106 Mich. 390, 58 Am. St. Rep. 499; but compare note to Graham v. Burch, 28 Am. St. Rep. 355.

OBJECTIONS TO EVIDENCE must be made, if at all, when it is offered: Note to Winters v. Winters, 63 Am. St. Rep. 433.

HUNT v. NEW HAMPSHIRE FIRE UNDERWRITERS' ASSOCIATION.

[68 NEW HAMPSHIRE, 305.]

DEBTOR AND CREDITOR—PROVISION FOR PAYMENT OF DEBT—INDEMNITY—RIGHTS OF CREDITOR.—A creditor, for the satisfaction of his debt, may, in equity, avail himself of any subsisting provision made by his insolvent debtor for its payment; and an appropriation or pledge of property by the debtor, for the purpose of indemnifying against the debt any person liable for it, is equitably equivalent to a provision for its payment.

INSURANCE—CONTRACT OF REINSURANCE—INDEMNITY.—An insurance contract is a contract of indemnity; and, by a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured.

INSURANCE—REINSURANCE—EXTENT OF LIABILITY IN CASE OF LOSS.—If one-third of a risk is reinsured, and one-half of this, or one-sixth of the whole risk, is again reinsured for the first reinsuring company, which afterward becomes insolvent, the last reinsuring company is answerable, in case of loss, for the whole amount against which it indemnified; and not merely for one-half of the sum which the insolvent company may pay to its creditors.

INSURANCE—REINSURANCE—PAYMENT, IN CASE OF LOSS, MAY BE MADE TO INSURED.—In case of loss, a reinsuring company may lawfully pay it to the person insured. Hence, if a risk is reinsured for a reinsuring company, which becomes insolvent, the amount paid by the second reinsuring company, in case of loss, equitably belongs to the company first reinsured, where it has paid the loss, and the second reinsurers may, therefore, lawfully make payment to such company.

Assumpsit. The property of a railroad company was insured by the Granite State Fire Insurance Company. One-third of the risk was reinsured in the People's Fire Insurance Company, and the defendant association reinsured the People's company for one-half of their risk. Sometime after this a loss ensued, which the Granite State company paid. About the time when payment was made the People's company was in process of liquidation and settlement of its affairs by a receiver, who acted under the direction of the court, and it was not known whether the assets were sufficient to satisfy the liabilities. Hunt, the receiver, brought an action against the defendant association, whose contract contained the following clause: "Loss, if any, to be settled and paid pro rata with the reinsured, and at the same time and place, and upon the same terms and conditions." The plaintiff claimed that the defendants were bound to pay to him one-sixth of the total loss, without waiting for the settlement

of the affairs of the People's company, and without regard to the dividend that might ultimately be paid to creditors of that company. But the defendants claimed that they were answerable to the plaintiff for only one-half of the sum which the People's company might ultimately pay. The Granite State company, upon receiving notice of the action, appeared and claimed whatever the defendants were bound to pay.

David Cross, for the plaintiff.

Leach & Stevens, for the defendants.

Calvin Page, for the claimant company.

³⁰⁶ CARPENTER, J. The question presented by the parties is whether the defendants are bound to pay to the People's company the entire amount of the loss against which they agreed to indemnify the People's, or only such a part thereof as the insolvent People's may ultimately pay. The defendants received a full consideration for the risk against which they insured, and there is no reason why they should not be required to pay the full amount of the loss: *Blackstone v. Allemania etc. Ins. Co.*, 56 N. Y. 104, 106. The premium received by them and the sum to be paid by them in case of loss were intended to be, and in theory of law are, precisely equivalent: *King v. State Mut. Fire Ins. Co.*, 7 Cush. 1, 54 Am. Dec. 683. Their position is in legal effect the same as it would be if the People's, for the purpose of paying the loss, had deposited with them the full amount of it in money.

But the further question whether the money due on the contract equitably belongs and should be paid to the People's or to the Granite State company arises on the face of the case. For convenience of consideration a simpler parallel case may be taken.

The People's insure A's house for ten thousand dollars, and immediately reinsure for the same amount with the defendants. The house is burned; and shortly after the People's become insolvent, and, ³⁰⁷ as may be supposed, unable to pay any part of their indebtedness. The defendants, willing to perform their just obligations, file a bill of interpleader against A and the People's, and pay the ten thousand dollars into court. To which party, A who has lost that amount, or the People's who have lost nothing, does the money in equity belong? The particular terms of the policy issued by the defendants are not material. It must be assumed that by it the defendants merely

stipulate to indemnify the People's, to the extent of the sum named, against loss by reason of the destruction of A's house by fire, because they have no power to make any contract of insurance except contracts of indemnity.

In *Keene Five Cents Sav. Bank v. Herrick*, 62 N. H. 174, Jarib Herrick, as principal, and John W. Herrick, as surety, were indebted to the plaintiffs upon a promissory note. January 27, 1877, Jarib gave John W. a mortgage of real estate conditioned to indemnify him against loss by reason of his having signed the note. In 1878, Jarib obtained his discharge in bankruptcy. His assignee sold the land, subject to the mortgage, to the defendant, S. In 1879, John W. died insolvent. No part of the note being paid, the plaintiffs brought their bill in equity against Jarib, the administrator of John W., and S., praying that the mortgage be assigned to them, and prevailed.

The condition of the mortgage was not that Jarib should pay the note, but that he should save his surety harmless. The surety paid and could pay nothing. The condition according to its literal terms was not, and apparently never could be, broken. The court said that equity disregards mere form, and held that the transaction was in substance an appropriation of the mortgaged property for the payment of the debt in case it was not otherwise satisfied by the mortgagor. The purchaser at the assignee's sale took the property with notice. In equity, it belonged to the plaintiffs for the purpose of satisfying their debt, and to the extent necessary for that purpose. Their right did not depend upon privity of contract. In fact, there was none. It did not appear that the plaintiffs had any knowledge of the mortgage until they filed their bill. It was immaterial that the relation of principal and surety existed between the mortgagee and mortgagor—the result would have been the same had they been joint principals, or if the mortgage had been given by the surety to the principal. It was equally immaterial that the mortgagee was bound to pay the debt, except that his liability was essential to the particular form of the security given. The result would have been the same if Jarib had given a deed of the same property to a stranger on condition that the grantee indemnify and save him harmless from his liability on the note. In short, the decision rested wholly upon the broad ground that, in equity and good conscience, the mortgaged property should be³⁰⁸ applied to the satisfaction of the plaintiff's debt. The facts in all material respects and the judgment of the court in *Holt v. Penacook Sav. Bank*, 62 N. H. 551, and *Barton v. Croydon*, 63

N. H. 417, were the same as in *Keene Five Cents Sav. Bank v. Herrick*, 62 N. H. 174.

These cases establish the propositions that a creditor, for the satisfaction of his debt, may, in equity, avail himself of any subsisting provision made by his insolvent debtor for its payment; and that an appropriation or pledge of property by the debtor for the purpose of indemnifying against the debt any person liable upon it is equitably equivalent to a provision for its payment.

The principle of the first proposition is often applied in actions at law: *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Reed v. Paul*, 131 Mass. 129; *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741; *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584; *Hodgdon v. Merrill*, 26 N. H. 16, 18.

If A, for a good consideration, agrees with B to indemnify him against his indebtedness to C, A, as between him and B, becomes the principal debtor. The debt is in equity his debt and not B's. Having received a full consideration for his undertaking, he is morally and equitably as much bound to pay the debt to C, as he would be if B had delivered to him and he had accepted the amount of the debt in gold coin in trust for its payment. If, for technical reasons, the law is powerless to enforce the duty, equity is subject to no such weakness: *Philbrick v. Shaw*, 61 N. H. 356. It will not permit him to retain the money, the consideration of his agreement, and escape its performance on the flimsy pretext that until B is compelled to pay the debt, or a part of it, he has fulfilled the letter of his obligation. He may be compelled at law to pay the debt if B is solvent, and in equity, at least, he is not relieved from the duty by the accident of B's insolvency. Whether the agreement may be revoked at any time before C is informed of and assents to it need not be considered. It is enough for present purposes that it cannot be annulled after C intervenes and asserts against B his claim for its performance.

An insurance contract is a contract of indemnity. "It does not differ from a bond of indemnity or a guaranty of a debt, since the obligor or guarantor takes upon himself certain risks to which the obligee or creditor would otherwise be exposed. The only difference is in names and form of the instrument, the consideration for an insurance being always called a premium, and the instrument containing the terms of the contract, a policy": 1 *Phillips on Insurance*, 2d ed., sec. 2. By a contract of reinsurance, in whatever language expressed, the obligation of

the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured. They stand in a relation to each other much like that of principal and surety. The only material ³⁰⁹ difference is that the reinsurer is not in law directly liable to the insured. As between the two, he is the principal obligor.

In the case supposed (as in the actual case), as long as the People's are solvent there is no difficulty or question. A recovers of them the full amount of his loss, and they recover the same sum of the defendants. The contracts of both companies are performed. There is no occasion for this circuitry. The sole duty of the defendants under their contract is to hold the People's harmless. They have the right to pay directly to A the amount of his loss; by so doing they fully perform their contract. The obligation of the People's to A is discharged. But whichever method is adopted, A is indemnified, and the People's, assuming that the same premium is paid for the insurance and for the reinsurance, neither gain nor lose by the transaction.

The plaintiff claims that by the mere accident of the insolvency of the People's and inability to pay more than ten per cent of their liabilities, the defendants' contract is materially modified. They are no longer at liberty to perform it by paying directly to A the amount of his loss. It is not now enough that in compliance with the literal terms of the contract they protect the People's from loss. They must, it is said, pay the full amount of the loss to the People's; and A, in common with their other creditors, is entitled to ten per cent only of the sum justly due to him. In other words, the People's, for the sole reason that they can pay ten per cent only of their indebtedness, are, it is claimed, justly entitled to realize out of A's loss of ten thousand dollars, which by their contract they are bound to pay, a net profit of nine thousand dollars. They are to profit by their losses. It is for their interest—for the interest of every one of their creditors—that all the property insured by them, and by them reinsured in a solvent company, be destroyed by fire. Such a result equity will not tolerate. It is not good law or good morals that one should profit by the destruction of his neighbor's property (1 Story's Equity Jurisprudence, sec. 493), especially if he has himself agreed to make the loss good. "A contract to tempt a man to transgress the law . . . is void by the common law": *Collins v. Blantern*, 2 Wils. 347, 350.

The People's, under their contract with the defendants, are entitled to protection against loss by reason of the destruction

of the insured property, and to nothing more. They cannot object to a judgment or decree which has that effect. The defendants cannot object to a judgment that they pay the money to the insured because it is to them immaterial whether they pay it to him or to the insurer.

Upon filing a proper bill in equity by the Granite State, there will be a decree in their favor; or they may, upon reimbursing the plaintiff for all expenses hitherto incurred by him in the prosecution of this action, take judgment therein for their use.

³¹⁰ *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. 63, and the later cases which have followed it have been considered, and their doctrine is not approved.

Case discharged.

All concurred.

REINSURANCE IS A MERE CONTRACT OF INDEMNITY, in which the insurer reinsures risks in another company, and is solely for the benefit of the insurer: *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438. The liability and remedies of the parties to a contract of reinsurance are discussed in a monographic note to *Barnes v. Hekla Fire Ins. Co.*, 45 Am. St. Rep. 442-451.

BEACHAM v. PROPRIETORS OF PORTSMOUTH BRIDGE.

[68 NEW HAMPSHIRE, 382.]

CONFLICT OF LAWS—LEX LOCI AND LEX FORI.—If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts the same as in contracts, in respect to the legal effect and incidents of acts.

CONFLICT OF LAWS—ACTION FOR INJURY OCCURRING ON THE LORD'S DAY—DEFENSE.—If a person is prohibited, by statute, from recovering damages for an injury, caused by the negligence of another, to his person or team, while traveling, in one state, for pleasure, on the Lord's day, that is a good defense to an action brought in another state for such injury.

Case for negligence. The defendants owned and possessed a toll bridge over the Piscataqua river between Portsmouth and Kittery. The plaintiffs, Beacham and another, after having paid the required toll, were crossing the bridge, on Sunday, April 29, 1894, on a pleasure excursion, with a barge drawn by four horses; and, while on the portion within the state of Maine, one of the horses was injured by a defect in the bridge, caused by the defendant's negligence. It was sought to recover damages for the injury by an action brought in New Hampshire. The laws of Maine pertaining to the questions in-

volved were a part of the case. The plaintiffs obtained a verdict for one hundred and fifty dollars, and it was filed. This verdict was to be set aside, and there was to be judgment for the defendants, if the action could not be maintained; otherwise, there was to be judgment on the verdict.

Samuel W. Emery, for the plaintiffs.

Frink & Marvin, for the defendants.

382 CHASE, J. If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts the same as in contracts, in respect to the legal effect and incidents of acts: Cooley on Torts, 471; Story on Conflict of Laws, 7th ed., sec. 307 d; Mostyn v. Fabrigas, Cowp. 161; **383** Phillips v. Eyre, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; Smith v. Condry, 1 How. 28; Dennick v. Railroad, 103 U. S. 11; Walsh v. New York etc. R. R. Co., 160 Mass. 571, 39 Am. St. Rep. 514; Henry v. Sergeant, 13 N. H. 321; Laird v. Railroad, 62 N. H. 254, 13 Am. St. Rep. 564. Therefore, whatever would be a defense to this action if it had been brought in the state of Maine is a defense here, although it would not be if the cause of action had arisen in this state.

By section 20, chapter 124, of the Revised Statutes of Maine, a person who travels on the Lord's day, except from necessity or for charity, may be punished. Walking for exercise (O'Connell v. Lewiston, 65 Me. 34, 20 Am. Rep. 673; Davidson v. Portland, 69 Me. 116, 31 Am. Rep. 253), carrying a disabled person to a ride to give him the benefit of air and exercise (Sullivan v. Maine Cent. R. R. Co., 82 Me. 196), and carrying a visitor home who insists upon going (Buck v. Biddeford, 82 Me. 433), come within the exception; but traveling for pleasure is an offense under the statute, and has the effect to disable the offender from recovering damages for an injury to his person or team while so traveling, caused by the negligence of another: Hinckley v. Penobscot, 42 Me. 89; Cratty v. Bangor, 57 Me. 423, 2 Am. Rep. 56; Parker v. Latner, 60 Me. 528, 11 Am. Rep. 210; Wheelden v. Lyford, 84 Me. 114.

The plaintiffs raise the query whether this is now the law of Maine, in view of the decision in Baker v. Portland, 58 Me. 199, 4 Am. Rep. 274. In that case the plaintiff's cause of action was an injury received in consequence of a defective highway, and the defense was that, at the time of the injury, the plaintiff was violating a city ordinance which prohibited driving at a faster rate of speed than six miles an hour, under a penalty. It was

held that a violation of the ordinance would not be a defense unless it contributed to produce the injury. Of cases in which it had been held that a person violating a penal statute could not recover for his injury, the court said: "It will be seen, upon examination, that the wrongful act of the plaintiff either was, or was assumed to be, in some manner or degree contributory to the production of the injury complained of." The violation of an ordinance against fast driving may or may not tend to cause an injury to a traveler according to the circumstances, but the violation of the statute against traveling on the Lord's day necessarily causes the traveler to be in the position where he was injured; it tends to produce the injury by furnishing the opportunity for receiving it: *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56. The cases of *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210, and *Wheelden v. Lyford*, 84 Me. 114, decided since *Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274, show that the law as laid down in *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56, was then regarded as the law of the state. If it was not the law of the state as late as March 21, 1895, there would have been no occasion for the act of the Maine legislature of that date (*Laws* 1895, c. 129), which in effect repeals the law of *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56, and other like cases, by providing that the provisions of chapter 124 of the ³⁸⁴ Revised Statutes relating to the observance of the Lord's day, shall not affect the right or remedy of a party growing out of an injury received on that day.

The plaintiff's injury having been received while they were traveling in the state of Maine upon a pleasure excursion on the Lord's day, prior to the enactment of the Maine statute of 1895, their rights are governed by the law of *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56, and the other cases cited.

Verdict set aside; judgment for the defendants.

Wallace, J., did not sit; the others concurred.

CONFLICT OF LAWS—RIGHT OF ACTION.—If there is no law giving a right of action in the place where a wrongful act was committed, no action can be maintained in another state, although the law of the latter state gives such right of action; and where the law of the state in which the wrongful act was committed gives a right of action, but the law of the state where the remedy is sought does not give such right, no action can be maintained: See note to *Attrill v. Huntington*, 14 Am. St. Rep. 354, 355. There can be no recovery in one state for injury received through negligence in another, unless the infliction of the injury is actionable under the law of the state where it is sustained: See note to *Derr v. Lehigh Valley R. R. Co.*, 38 Am. St. Rep. 851.

JOHNSON v. WHITE MOUNTAIN CREAMERY ASSN.

[68 NEW HAMPSHIRE, 437.]

SETOFF—RECOUPMENT.—DAMAGES that accrue to a defendant from the transaction out of which the plaintiff's cause of action arises may be recouped.

SETOFF — RECOUPMENT—SERVICES—DAMAGES.—If a plaintiff brings an action to recover for services rendered during a certain time, damages which were the direct result of his negligence and disobedience of orders in performing such services may be recouped.

PLEADING—AMENDMENT — FORM OF ACTION.—When the merits of a controversy have been determined, after a full and fair trial, and the only objection is to the form of procedure, the prevailing party will be permitted to file any amendment of his pleadings which may be necessary to obviate the objection, and thereupon to take judgment.

JUDGMENT—RENDITION OF.—Ordinarily, it is the duty of the court to render such judgment as, upon the whole record, the law requires, without regard to any request or want of request therefor.

SETOFF—RECOUPMENT—DAMAGES—JUDGMENT FOR EXCESS.—If a defendant pleads his demand in recoupment, and his damages are greater than the amount due to the plaintiff, he is entitled to judgment for the excess.

Assumpsit. The writ contained a special count on a contract for the plaintiff's services for one year from May 1, 1894. The breach alleged was his discharge on January 1, 1895. The writ also contained general counts, under which the plaintiff specified a claim for two hundred and sixty dollars as a balance due for labor. The general issue was pleaded with a brief statement, setting up in recoupment the loss of four hundred and fifty-seven dollars and sixty cents through the plaintiff's negligence and his disobedience of the defendants' orders. The defendants had employed the plaintiff, in April, 1893, as a butter-maker and general manager of their business of butter-making, at a salary of seven hundred dollars a year in case he should be retained in their employ for a full year; if not, he was to be paid two dollars and fifty cents per day for the time he worked. The plaintiff served continuously from May 1, 1893, until January 1, 1895. There was due to him one hundred and eighty-five dollars and sixty-seven cents on account of his wages for the year ending April 30, 1894. At the end of the first year the parties agreed that the plaintiff should continue in his employment for another year, at a yearly salary of six hundred and fifty dollars, each party reserving the right to terminate the contract upon giving the other reasonable notice. The plaintiff

was discharged, after such notice from the defendants, on January 1, 1895. There was due to the plaintiff, on account of his wages from May 1, 1894, to January 1, 1895, the sum of six dollars and eighty-three cents. The defendants were damaged, in June, 1894, to the amount of four hundred and fifty-seven dollars and sixty cents by the plaintiff's negligence and disobedience of the defendants' directions. It was ruled by the referee that the defendants were entitled to recoup their damages to the extent of one hundred and ninety-two dollars and fifty cents, the whole amount due to the plaintiff, and there was a general finding in their favor. The plaintiff excepted, and moved for judgment on the report for one hundred and eighty-five dollars and sixty-seven cents. The defendants moved for judgment for the remainder of their damages after deducting the sum found due to the plaintiff.

George H. Bingham, for the plaintiff.

Bingham, Mitchell & Batchellor, for the defendants.

438 CARPENTER, J. Damages that accrue to a defendant from the transaction out of which the plaintiff's cause of action arises may be recouped: *Cole v. Colburn*, 61 N. H. 499; *Simonds v. Cross*, 63 N. H. 123. The doctrine of recoupment is in general applicable whenever in the trial of the plaintiff's action an investigation of the facts on which the claim of the defendant depends is necessary. The law does not compel parties to bring two actions when with equal convenience their rights can be settled in one.

The employment of the plaintiff by the defendants as the manager of their business, and the rendition of his services in that **439** capacity from May 1, 1893, to January 1, 1895, constituted a single transaction within the meaning of the rule. The plaintiff's action is brought to recover for services rendered during that time, and the damages sought to be recouped are the direct result of his negligence and disobedience in performing them. The duties of the plaintiff were not affected by the change of his compensation or other modification of the contract. The legal aspect of the transaction, so far as the present question is concerned, is the same as it would have been if the terms of his employment after May 1, 1894, had been agreed upon in the first instance.

The question of the damage caused to the defendants by the plaintiff's negligence was necessarily tried. There is no sugges-

tion that the plaintiff was not accorded as thorough and fair a trial, that he was not as fully and satisfactorily heard by his witnesses and counsel, as he could have been in an independent action brought against him by the defendants for the same cause. The only objection to a recovery by the defendants of the balance found due to them after satisfying the amount due to the plaintiff rests upon the form of the proceeding in which the trial was had. Objections of this character, the court does not stop to consider. When on a full and fair trial the merits of a controversy have been determined and the only objection is to the form of procedure, the prevailing party is permitted to file any amendment of his pleadings that may be necessary to obviate the objection, and thereupon to take judgment: *Clark v. Clark*, 62 N. H. 267, 272; *Cushing v. Miller*, 62 N. H. 517, 527; *Fitch v. Nute*, 62 N. H. 700; *Cole v. Gilford*, 63 N. H. 60; *Peaslee v. Dudley*, 63 N. H. 220; *Smith v. Hadley*, 64 N. H. 97; *Sleeper v. Kelley*, 65 N. H. 206. To entitle the defendants to judgment for the balance of their damages, no amendment is necessary. Their cause of action is fully set forth in their brief statement. It contains no prayer for a judgment for the balance due to them. If in this particular it is defective, it may be now amended. Ordinarily, it is the duty of the court to render such judgment as upon the whole record the law requires, without regard to any request or want of request therefor: *Kittredge v. Emerson*, 15 N. H. 227, 239; *Rochester v. Whitehouse*, 15 N. H. 468, 474; *Le Bret v. Papillon*, 4 East, 502.

Cross-actions in cases of this kind, especially when separately tried, entail a needless expense. They depend to a large extent, if not altogether, upon the same evidence, and in our practice usually are, as they always ought to be, tried together. In such a trial, the second action in most cases serves merely to confuse the issues and perplex the jury. In *Cook v. Castner*, 9 Cush. 266, two actions, one for deceit of the vendor in the sale of a vessel and the other in assumpsit for the unpaid part of the purchase ⁴⁴⁰ money, were tried together. The jury were directed "first, to find whether any fraud had been practiced by the sellers of the vessel, and if so, what were the damages. . . . If it equaled or exceeded the balance due for the purchase, then the defendants in this action would be entitled to a general verdict, and, as plaintiffs in the other action, be entitled to a verdict for the excess, if any. If damage was sustained, but less than the balance of the purchase, it would go in reduction of

the amount due the plaintiffs for the purchase, and they would be entitled to a verdict in this suit for the difference, and, as defendants, to a general verdict in the other action." If the defendants in the first action had pleaded their claim for the balance of the price in recoupment, the issues would have been less complicated and more conveniently tried. The jury would have been told to find the amount due the defendants for the purchase money, whether they practiced any fraud, and, if so, the damages thereby caused to the plaintiff, to return a verdict for the defendants if these sums were equal, and, if not, for the difference in favor of the party entitled to the larger sum.

The impression that the defendant who pleads his demand in recoupment cannot have judgment for the excess found due to him over the amount he owes to the plaintiff rests upon a dictum of Parker, J., in *Britton v. Turner*, 6 N. H. 481, 495, 26 Am. Dec. 713. The question was not there and never since has been judicially considered. In *Union Bank v. Blanchard*, 65 N. H. 21, the question whether the defendant could recover the balance of his damages set up in recoupment did not arise. He tendered the plaintiffs, and practically paid into court, six hundred and seven dollars and twenty-eight cents, thereby admitting that sum to be due to them after the damages which he sought to recoup were allowed to him, and, as the court there say, "the only question tried or that could be tried under the pleadings was . . . whether anything more was due." The plaintiffs were entitled to the full amount tendered, although it proved to be a larger sum than was due to them. What is there said, after the language quoted, so far as regards the law of this state, is merely a repetition of the dictum in *Britton v. Turner*, 6 N. H. 481, 495, 26 Am. Dec. 713.

Judgment for the defendants for two hundred and sixty-five dollars and ten cents.

All concurred.

RECOUPMENT—CONTRACTS—SERVICES—DAMAGES.—The defense of recoupment is admissible in an action upon a special contract; and, if the defendant can show that the plaintiff has himself violated the contract upon which he sues, to the defendant's injury, the recovery may be abated to the extent of such injury, or destroyed altogether if the defendant's damages equal or exceed the plaintiff's claim: See monographic note to *Van Epps v. Harrison*, 40 Am. Dec. 321, on recoupment in case of breach of contract. And the doctrine has been frequently applied in actions for the recovery of wages for labor performed: *Notes to Van Epps v. Harrison*, 40 Am. Dec. 332; *Woodruff v. Garner*, 89 Am. Dec. 487. Compare *Van*

Winkle v. Wilkins, 81 Ga. 93, 12 Am. St. Rep. 299; Andre v. Morrow, 65 Miss. 315, 7 Am. St. Rep. 658.

PLEADING—AMENDMENT—CHANGING FORM OF ACTION. Unless authorized by statute, an amendment of a declaration, which changes the form of action, is not allowable: Note to Flanders v. Cobb, 51 Am. St. Rep. 424.

AMEY v. WINCHESTER. BUCKLEY v. WINCHESTER.

[68 NEW HAMPSHIRE, 447.]

INNKEEPERS—LIABILITY TO PERSONS ATTENDING A CLUB BANQUET.—A person is not answerable, as an innkeeper, to those who are at his inn for some special purpose, not connected with passage or travel, and who lose their property there, not in the character of guests, but in the execution of a purpose distinct from their accommodation as such. Thus, if an innkeeper furnishes, in his dining-room, a banquet for a club, and a person who attends the banquet loses his hat there, the innkeeper is not answerable for it.

Case, against an innkeeper, by each plaintiff for the loss of his hat. The defendant had provided in his dining-room a banquet for a club, under a contract by which the club agreed to pay a specified sum for each plate. Many persons were present, among them the plaintiffs, but the latter were not members of the club. They attended by invitation and paid for their plates. They registered their names at the hotel, and were assigned a room, which they occupied. Upon entering the dining-room, they, in common with others, placed their hats on a rack which stood near the entrance thereof and upon which the guests of the hotel were invited to put their hats while eating their meals. The plaintiffs left the banquet about 11 o'clock in the evening, intending to return before it was over. They went to their room without taking their hats, and remained more than an hour. Upon their return, they found the banquet ended, the doors of the dining-room closed, and their hats missing. They remained at the hotel over night, and on the next morning demanded their hats of the defendant, who could not produce them and who refused to pay for them. The defendant was not guilty of any actual negligence.

Drew, Jordan & Buckley, for the plaintiffs.

Isaac L. Heath and Ladd & Fletcher, for the defendant.

449 **BLODGETT, J.** To subject the defendant to liability as innkeeper, it must appear not only that the plaintiff's goods

were lost at his inn, but that he was acting in the capacity of innkeeper when the goods were lost, and that the plaintiffs were his guests; or, in other words, that the plaintiffs were at the inn for purposes which the common law recognizes as the purposes for which inns are kept, namely, the accommodation and entertainment of travelers and wayfaring men, and not for those who may be there for some special purpose not connected with passage or travel: *Calye's Case*, 8 Coke, 32, and note; *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762; *Fitch v. Casler*, 17 Hun, 126; *Gastenhofer v. Clair*, 10 Daly, 265, 266; 11 Am. & Eng. Ency. of Law, 20, 21; *McDaniels v. Robinson*, 62 Am. Dec. 590, note.

Upon the facts as reported, we think the rigorous rule that makes the landlord of an inn responsible for the goods of his guests under almost all circumstances, and without proof of negligence or fault on his part or of those in his employ, cannot be extended so as to protect the plaintiffs, for as to the banquet where the loss occurred, and which they attended on the invitation and at the expense of the club, the plaintiffs are justly to be regarded as its guests, and not of the defendant, as innkeeper or otherwise, who simply provided the banquet as caterer under a contract with the club, without any lien or claim for compensation against its guests, and with no right or power to exclude anybody from participating in its festivities whom the club might properly invite.

Neither by contract nor by operation of law was the defendant acting in the character of innkeeper as to the club, and still less as to its guests, who would have had no right whatever to attend except upon its invitation. Both the club and its guests ⁴⁴⁰ came not as ordinary travelers to an inn, but as to a banquet, for the purpose of participating in and enjoying its festivities. And likewise as to both, the fact that the defendant chanced to be keeping an inn and served the banquet there makes his liability no greater than that of any other person, not an innkeeper, who might have taken and executed the contract either at the inn or elsewhere. One may be an innkeeper without being a club caterer, or he may be a club caterer without being an innkeeper, or he may be both; but if he is, the two employments are so far separate and distinct in respect of duties and liabilities as not to make him responsible in the one capacity for liabilities incurred in the other: See *Minor v. Staples*, 71 Me. 316, 36 Am. Rep. 318.

Nor does the fact that the plaintiffs had registered and been

assigned a room in the inn affect the legal status of either party. As to the banquet where the loss occurred, "Which was not furnished to the guests of the house and was not one of the meals provided for them," the plaintiff's registration and assignment put them in no different position in a legal sense than they would have occupied if they had registered and obtained a room elsewhere, or if the defendant had served the banquet at some place separate from and disconnected with his inn.

Not having lost their property at the defendant's inn in the character of guests, but in the execution of a purpose distinct from their accommodation as guests, the plaintiffs' actions are not maintainable: Authorities *supra*.

Other grounds of defense need not be considered.

Judgment for the defendant.

Carpenter, J., did not sit; the others concurred.

INNKEEPERS.—THE LIABILITY of an innkeeper does not extend to goods not received in the capacity of an innkeeper: See monographic note to *Pettigrew v. Barnum*, 69 Am. Dec. 223, showing what goods of a guest innkeepers are liable for. Persons who attend balls, parties, etc., at a hotel or inn, upon invitation, or by reason of having a ticket for the entertainment, are not guests, and the innkeeper, in the absence of negligence, is not answerable for their loss of overcoats, fur collars, gloves, and the like: *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762; note to *Hancock v. Rand*, 46 Am. Rep. 121; and monographic note to *McDaniels v. Robinson*, 42 Am. Dec. 590, on who are guests at an inn, and when they cease to be so.

CARPENTER v. FISHER.

[68 NEW HAMPSHIRE, 486.]

DAMAGES CAUSED BY INJUNCTION—HOW DETERMINED.—The question of the amount of damages caused to a prevailing defendant by a preliminary injunction is incidental to the principal issues, and should, upon the motion of either party, be determined by the court which heard the cause, without the aid of a jury.

Action of debt on an injunction bond. The bond was given in a suit in equity brought by Fisher against Carpenter. It was executed by Fisher, as principal, and by the other defendants, Hill and Chandler, as his sureties. Hill and Chandler were citizens of New Hampshire, the writ was served upon them, and they appeared by counsel. The principal was a citizen of Massachusetts. Fisher was and had been consul of the republic of

Chili, in Boston, since 1876, and had been officially recognized as such by the President of the United States. Fisher had attachable real and personal property in New Hampshire at the date of the writ, but the writ was not served upon him, and no attachment of his property was made. He appeared specially for the purpose of moving, or joining with the other defendants in moving, that the action be dismissed for want of jurisdiction; and the defendants did make such a motion.

E. A. & C. B. Hibbard, for the plaintiff.

Burleigh & Adams, for the defendants.

493 CARPENTER, C. J. As a general rule, equity, having acquired jurisdiction of a cause, disposes of all questions the decision of which is necessary to its final determination: *Eastman v. Savings Bank*, 58 N. H. 421; *Moody v. Lucier*, 62 N. H. 584, 587, 588. The question of the amount of damages caused to a prevailing defendant by a preliminary injunction is incidental to the principal issues. It is to be determined upon equitable principles, in view of all the circumstances of the case. In an investigation of the merits, all, or nearly all, the evidence affecting the damages is heard and considered. Neither party has a right to a trial of the question by the jury. Such a trial might, and in many cases would, involve a retrial of the entire cause. The parties should not be subjected to this needless expense. Although, in a few instances, the question of the amount of the damages has been submitted to the jury or otherwise determined in an action at law on the bond, it has been for the reason that neither party objected, and the attention of the court was not called to the subject: *Derry Bank v. Heath*, 45 N. H. 524; *Towle v. Towle*, 46 N. H. 431; *Solomon v. Chesley*, 59 N. H. 24; *Jackman v. Eastman*, 62 N. H. 273; *Gage v. Porter*, 64 N. H. 619. Generally, the court that hears the principal cause has, if requested, determined the question. It is the proper practice. In an action at law on the bond, the parties are entitled to trial by jury if the damages claimed exceed one hundred dollars. Trials by jury are expensive to the public. One object of the amendment of the constitution, adopted in 1877, depriving parties in civil actions of the right of trial by jury "in cases in which the value in controversy does not exceed one hundred dollars and the title to real estate is not concerned" (Bill of Rights, **494** art. 20), was to save the public expense of such trials in that class of cases. Since that time jury trials in those cases have not been allowed, though desired and moved

for by both parties, except for special and extraordinary reasons. It does not appear that there is any reason for sending the question of damages in the present case to a jury. Upon the motion of either party, the court that heard the cause would have determined what, if anything, Fisher should pay to Carpenter to indemnify him for the injury caused to him by the injunction. If an action on the bond should be necessary to obtain satisfaction of the amount adjudged due, no question, in the absence of fraud, would be open to the defendants except that of its execution. Upon the motion of either party, the original action may be brought forward, the question of Carpenter's damages be determined by the court, and execution for the sum found his due be issued against Fisher.

It does not follow that the present action was improvidently brought. It may be necessary to secure the payment of the judgment that may be rendered against Fisher. It will stand continued until the amount Fisher ought to pay is determined and an execution for that sum is returned unsatisfied, or until it is otherwise made apparent that the plaintiff must rely for indemnity upon the obligation of the sureties.

If any judgment that may be obtained against Fisher is satisfied, the question of the jurisdiction of the court in this action will not arise. Until it does arise, it need not be considered. To this suit Fisher is not a party. Whether, being interested in the result and perhaps concluded, as between him and the defendants, by a judgment against them, he has a legal right to appear and raise the question of jurisdiction or join with the defendants in raising it, or whether he may be lawfully refused permission to appear for that purpose (*Reynolds v. Damrell*, 19 N. H. 394; *Kimball v. Wellington*, 20 N. H. 439; *Levy v. Woodcock*, 63 N. H. 413; *Martin v. Wiggins*, 67 N. H. 196), may or may not prove to be material questions. However that may be, the plaintiff has leave to strike his name out of the writ.

Case discharged.

All concurred.

INJUNCTION — IMPROPER ISSUANCE OF DAMAGES.—A court may decree damages upon the dissolution of an injunction which has been improperly issued. The defendant has this remedy in addition to his remedy upon the injunction bond: *Hubble v. Cole*, 88 Va. 236, 29 Am. St. Rep. 716.

JUDGE OF PROBATE v. SULLOWAY.

[68 NEW HAMPSHIRE, 511.]

EXECUTORS AND ADMINISTRATORS—PERSONAL DEBT TO DECEDENT—COMMON-LAW RULE.—Except as against creditors, an executor's indebtedness to the testator was, by the common law, released or extinguished.

EXECUTORS AND ADMINISTRATORS.—THE LIABILITY OF THE SURETIES on an executor's bond is coextensive with that of the principal, and a decree of the probate court which binds the principal is binding on the sureties.

EXECUTORS AND ADMINISTRATORS—PERSONAL DEBT TO DECEDENT—SURETIES' LIABILITY FOR.—After an executor has been charged, by a decree of the probate court, upon the settlement of his account, with a personal debt which he owed to the decedent, the sureties on the executor's bond are, under the statute of New Hampshire, answerable for the payment of the debt, notwithstanding the executor's insolvency or inability to pay it.

EXECUTORS AND ADMINISTRATORS—DECREE CHARGING EXECUTOR WITH PERSONAL DEBT TO DECEDENT—CONCLUSIVENESS OF.—A decree of a probate court charging a person, as executor, with the amount of his personal indebtedness to the decedent is conclusive, both as against the principal and his sureties, until reversed upon appeal, and cannot be collaterally attacked.

EXECUTORS AND ADMINISTRATORS — DECREE AGAINST ADMINISTRATOR DE BONIS NON—SURETIES OF EXECUTOR—LIABILITY.—The sureties of an executor who dies before his account is settled are strangers to a decree made on the settlement of the account of an administrator de bonis non, and are not bound by such decree; and, as they are not bound by it, neither is the administrator de bonis non bound by it, as against them.

PLEADING—AMENDMENT—PARTY IN INTEREST.—It is proper, even after a decree in probate proceedings, to permit an amendment naming one who has an equitable and beneficial interest in the subject matter of litigation as a party to the suit.

EXECUTORS AND ADMINISTRATORS—SUIT ON BOND—PREREQUISITE.—When a sum of money due to another from a deceased executor is admitted, a decree of the probate court that the amount be paid is not necessary to a suit on the bond of the executor's sureties.

Action of debt brought by the judge of probate against the defendants, Sulloway and another, as sureties on the bond of Daniel Barnard, executor of the will of Eliza Bean. Barnard was indebted to the estate, at the time of his appointment, upon two promissory notes payable to Eliza Bean. He charged himself with the amount of his debt to the estate, and filed an account, but died before it was settled. James E. Barnard was appointed administrator of Daniel Barnard's estate, and settled the account filed by the latter, upon which settlement it was decreed by the probate court that there was in the hands of

Daniel Barnard, at the time of his decease, to be accounted for by his administrator, the sum of seventeen thousand seven hundred and fifty-one dollars and seventy cents, which included Daniel Barnard's individual debt to the estate upon the two notes. James E. Barnard was also appointed administrator de bonis non of the estate of Eliza Bean, and, upon the settlement of his account, he was, by the decree of the probate court, charged with the full amount found to be in Daniel Barnard's hands at his decease. Of this amount Sarah E. Elliott, as administratrix of the estate of Lydia Elliott, was by law entitled to the sum of five thousand four hundred and forty-seven dollars and forty-eight cents. James E. Barnard never, in fact, received the money due from Daniel Barnard to Eliza Bean's estate. He paid Sarah E. Elliott in full, turning over to her as cash the claim against Daniel Barnard's estate upon the notes. She gave a receipt in full settlement of her claim against the Bean estate, but neither intended to release the sureties on Daniel Barnard's bond. Daniel Barnard was insolvent when he was appointed executor, and continued so until his death. Sarah E. Elliott presented her claim on the notes to the commissioner on his estate, and it was allowed for the amount then due, five hundred and seventy-nine dollars and fifty-five cents. She had received a dividend of thirty per cent, and might receive another. If the plaintiff was entitled to judgment, it was to be for the remaining seventy per cent with interest.

Sargent & Hollis, for the plaintiff.

Edward B. S. Sanborn and Frank N. Parsons, for the defendants.

513 CLARK, J. One of the principal questions is whether the sureties upon an executor's bond are liable for the payment of his personal debt to the testator.

Except as against creditors, an executor's indebtedness to the testator was by the common law released or extinguished: 2 Blackstone's Commentaries, 512; Bacon's Abridgment, Executors (A), 10; 2 Williams on Executors, 1310, and cases cited; Wentworth on Executors, 1st Am. ed., 73-76; Coke on Littleton, 264 b, note 1; Gardner v. Miller, 19 Johns. 188; Marvin v. Stone, 2 Cow. 781, 809.

514 The purpose of section 7 of the act of July 2, 1822, was to abolish this rule: Norris v. Towle, 54 N. H. 290, 294. It provided that "all debts due from the executor or administrator to the testator or intestate shall be assets in his hands, for which

he shall account in the same way and manner as for a debt against any other person; and the judge of probate is hereby authorized to ascertain and liquidate such debt and charge the executor or administrator therewith": Laws 1822, c. 31, sec. 7. In the revision of 1842 it was condensed without alteration of the sense (Rev. Stats., c. 159, sec. 9), and has ever since stood upon the statute book in exactly the same language: Pub. Stats., c. 189, sec. 12. The statute affords no ground for the inference that the debt is not to be treated as assets unless the executor is solvent. The inference, if any, is quite the other way. No legal fiction is involved. It is pure matter of fact. The executor has, as matter of fact, received from the testator so much money or money's worth, and is answerable for it. It is money in his hands precisely as if a debtor had paid him so much money.

A like statute to the same effect and for the same purpose was enacted in New York: *Soverhill v. Suydam* 59 N. Y. 140, 142; *Baucus v. Stover*, 89 N. Y. 1 (where the statute is recited); *Matter of Consalus*, 95 N. Y. 340. The statute was passed in consequence of the decisions of the courts in accordance with the common law: *Thomas v. Thompson*, 2 Johns. 471; *Gardner v. Miller*, 19 Johns. 188; *Marvin v. Stone* (1824), 2 Cow. 781.

Without any special statute, the same result was reached in Massachusetts, Maine, Connecticut, and Vermont, either under general statutes providing for the settlement of estates and the distribution of property not devised or bequeathed (*Winship v. Bass*, 12 Mass. 198; *Probate Court v. Merriam*, 8 Vt. 234), or on the ground that the common-law doctrine had never been adopted: *Bacon v. Fairmain*, 6 Conn. 121, 129; *Williams v. Morehouse*, 9 Conn. 470, 474; *Davenport v. Richards*, 16 Conn. 310; *Potter v. Titcomb*, 7 Me. 302.

An executor or administrator is required by the statute to give a bond with sufficient sureties, on condition: 1. To return to the judge a true and perfect inventory of the estate of the deceased upon oath within three months from the date of the bond; 2. To administer the estate according to law; 3. To render an account within a year; and 4. To pay and deliver the rest and residue of the estate which shall be found remaining upon the account to such person or persons as the judge, by his decree according to law, shall limit and appoint: Pub. Stats., c. 188, sec. 12.

The liability of the sureties is coextensive with that of the principal: *Wattles v. Hyde*, 9 Conn. 10, 15. They are his

privies. ⁵¹⁵ By whatever decree of the probate court their principal is bound, they are bound: *Stovall v. Banks*, 10 Wall. 583; *Casoni v. Jerome*, 58 N. Y. 315; *Gerould v. Wilson*, 81 N. Y. 573; *Scofield v. Churchill*, 72 N. Y. 565; *Deobold v. Oppermann*, 111 N. Y. 531, 7 Am. St. Rep. 760; *Choate v. Arrington*, 116 Mass. 552, 556; *Towle v. Towle*, 46 N. H. 431, 434. This is because they have, in legal effect, so stipulated in the bond. It necessarily follows that they are bound to whatever in law their principal, the executor is bound. That he is bound to account for his indebtedness to the testator is not questioned, nor is it claimed that he is relieved from this obligation by the fact that he is insolvent or unable to pay. The judge of probate cannot release him from his obligation on the mere ground that he is unable to perform it. He has authority to determine whether the indebtedness exists and the extent of it (Pub. Stats., c. 189, sec. 12), and there his authority ends. If the debt is admitted or found, the judge of probate has no choice—he must charge it to the executor as a part of the assets belonging to the estate. This duty is imperative. He cannot authorize the executor to compromise with himself, nor has he any authority to negotiate and compromise with the executor: *Norris v. Towle*, 54 N. H. 290. It is wise that such should be the law. If it were otherwise, it would open a wide door to fraud. “On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself”: *Shaw, C. J.*, in *Kinney v. Ensign*, 18 Pick. 232, 236.

Stevens v. Gaylord, 11 Mass. 256, decided in 1814, is the earliest case on the subject. The court there say: “As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor (1 Salk. 306); and the same reason applies to an administrator, as the same hand is to receive and pay, and there is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the money to be now in the hands of the party, in his character of administrator. . . . The consequence is, that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased. It may be thought injurious to the sureties of the debtor that they should thus be made liable for a debt due from the administrator. To this it may be answered that, if such be the legal effect of the

bond, it is presumed to have been contemplated by the parties at the time of executing it; and they cannot afterward complain of the natural and legal consequence of their own voluntary act."

Such is the settled law in Massachusetts: *Winship v. Bass* (1815), 12 Mass. 198; *Kinney v. Ensign* (1836), 18 Pick. 232; *Ipswich ⁵¹⁶ Co. v. Story* (1842), 5 Met. 310; *Sigourney v. Wetherell* (1842), 6 Met. 553; *Benchley v. Chapin* (1852), 10 Cush. 173; *Mattoon v. Cowing* (1859), 13 Gray, 387; *Leland v. Felton* (1861), 1 Allen, 531.

"The surety is liable for whatever is properly chargeable to his principal in the official capacity, on account of which the bond was given": *Choate v. Arrington*, 116 Mass. 552, 556. There is in law or logic no escape from this conclusion. Such, in substance, was the decision in *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314. It is no hardship on the surety. He executes the bond for the purpose—the sole purpose—of securing to those interested in the estate whatever by law belongs to them—whatever money or property is in law a part of the assets.

In a proper case, he might, no doubt, upon taking the appropriate steps, be relieved; as if, e. g., he executed the bond in ignorance of the executor's insolvency, the executor might on his application be removed and another appointed; or he might be discharged under the Public Statutes, chapter 199, section 3, and a new bond required: See *Benchley v. Chapin*, 10 Cush. 173, 176. If a responsible party was bound with the executor for the debt, either as joint principal or as surety, equity would compel him to pay on the application of the surety on the bond.

In *Wheeler v. Emerson*, 44 N. H. 182, 188, it was held that where, by a decree of the probate court the executor is charged with the amount of his indebtedness to the testator, the surety is liable. It is said: "By statute, a debt due the intestate from the administrator is assets in his hands, and must be accounted for as other debts, and the decree of the probate court charges the principal debtor with the amount of such debts, and we must presume that he was rightfully charged. Under such circumstances, the sureties would be held." It was accordingly held that the trustee could not be charged for collaterals which he held for his security against his liability for the executor or administrator.

The decision in that case governs the present one. The executor here has been charged with his indebtedness to the testa-

trix by decree of the judge of probate. The liability of the surety cannot depend on the question whether he is secured against loss. The decree of the probate court charging Daniel Barnard, as executor, with the amount of his debt is conclusive until reversed upon appeal, and cannot be attacked collaterally.

In *Lyon v. Osgood*, 58 Vt. 707, the executor's indebtedness to the testator was nine thousand five hundred and eight dollars and eighty-two cents, and all the other assets were only four hundred and twenty-seven dollars. In a bill in equity brought by a surety to restrain an action against him on the bond, the court held that he was liable as surety for only such part of the debt as the executor at the time he was appointed or afterward was able to pay. Among ⁵¹⁷ other things the court say: "If, at the time the surety assumes responsibility, the executor is able to pay his debt to the estate, or afterward, during the settlement of the estate, he becomes able to pay it, the surety is responsible for it as assets. The executor's failure to account for his debt when he has the power and means to pay it, is a gross violation of his duty. It cannot be held to be a breach of trust for the executor not to do what is beyond his power and control to perform when free from laches. . . . In the absence of laches, we think the surety is liable upon his bond for the executor's debt only to the extent of the executor's ability to pay it." That is to say, the surety is liable in those cases only where no surety is needed.

In *Harker v. Irick*, 10 N. J. Eq. 269, 271, 272, the court say: "He [the surety] is only bound for the faithful performance of his duties as administrator. It could be no breach of trust or delinquency in duty for the administrator not to do what is beyond his power and control to perform. If, under such circumstances, the administrator should, in the settlement of his accounts with the court, charge himself with the debt, and the accounts should be passed in such a shape as to bind the surety for the debt, the surety would be relieved upon application to the proper tribunal from such responsibility. It would be a fraud on the surety to exact the debt from him, whether the administrator did or did not by his mode of accounting contemplate a fraud. But if, at the time the surety assumes his responsibility, the administrator owes the estate and is solvent and able to pay, the amount of the debt will be considered, in law and equity, as so much money in his hands as administrator at the time, and consequently the surety will be responsible for it. It is the duty of the administrator to collect the

debts of the estate without delay; and certainly any delay which places the debt he himself owes the estate in jeopardy and results in its loss is a gross violation of his duty as administrator." In other words, in New Jersey as in Vermont, when the executor is solvent and able to pay and no surety is needed, the surety is responsible for his debt; but, when the executor is unable to pay and a surety's liability would be valuable, the surety is not liable.

The defendants, as sureties of Daniel Barnard, are concluded by the decree made on the settlement of his account. They are privies to that decree: *Heard v. Lodge*, 20 Pick. 53, 58, 32 Am. Dec. 197, and cases before cited; *Towle v. Towle*, 46 N. H. 431, 434. To the decree made on settlement of James E. Barnard's account, as administrator de bonis non of Eliza Bean's estate, they are not privies but mere strangers. They are not bound by it, and, inasmuch as they are not, neither is James E. Barnard bound by it as against them: *Mahagan v. Mead*, 63 N. H. 130, 132; *Parker v. Moore*, 59 N. H. 454, 458; *Hale v. Woods*, 9 N. H. 103, 106.

⁵¹⁸ Though the legal interest in the sum due is in James E. Barnard, the equitable and beneficial interest is in Sarah E. Elliott. If the money should come to the hands of Barnard, he would be bound to pay over the same exact sum to her. Under these circumstances, no objection is perceived to an amendment naming her as the party in interest and to the issue of an execution for her use: Pub. Stats., c. 199, secs. 5-8. The sum due to her is admitted, and, in such case, a decree of the judge of probate that the amount be paid is not necessary to a suit on the bond: *Gookin v. Hoit*, 3 N. H. 392; *Judge of Probate v. Briggs*, 5 N. H. 66, 69, 70; *Judge of Probate v. Emery*, 6 N. H. 141; *Judge of Probate v. Locke*, 6 N. H. 396; *Judge of Probate v. Adams*, 49 N. H. 150.

Case discharged.

Blodgett and Parsons, JJ., did not sit; Chase, J., dissented; the others concurred.

EXECUTORS AND ADMINISTRATORS—PERSONAL DEBT TO DECEDENT—LIABILITY OF SURETIES.—Although a debt of an administrator is, by a fiction of law, to be considered as money on hand, it is based upon the supposed ability of the administrator to pay, and ought not to be allowed to work injustice against an insolvent administrator or his sureties: *Estate of Walker*, 125 Cal. 242, ante, p. 40, but see note thereto.

ADMINISTRATOR'S SURETIES—LIABILITY OF.—A decree rendered against an administrator is conclusive against his sureties:

Note to State v. Holt, 72 Am. Dec. 276. Compare Deobold v. Oppermann, 111 N. Y. 531, 7 Am. St. Rep. 760.

PLEADINGS—AMENDMENTS.—The power to allow amendments to pleadings is, in a large degree, in the discretion of the court, and should be liberally exercised in the furtherance of justice: Note to Adams v. Main. 50 Am. St. Rep. 273. They may be allowed, with certain limitations, both before and after judgment: Brown v. Mitchell, 102 N. C. 347, 11 Am. St. Rep. 748; and new plaintiffs may be substituted, by way of amendment, if the cause of action is not changed: Hubler v. Pullen, 9 Ind. 273, 68 Am. Dec. 620, and note.

NEWPORT v. UNITY.

[68 NEW HAMPSHIRE, 587.]

TAXES—TOWN REALTY IN ONE TOWN OWNED BY ANOTHER—EXEMPTION—PUBLIC PURPOSE.—Under the statutes of New Hampshire, land, and appurtenances upon it, if owned by one town, and situated in another, may be taxed in the town in which the property is located. The property of a town, though used for public purposes, if situated in another town, is not exempt from taxation.

Petition for abatement of taxes. The town of Newport, under the authority of chapter 169 of the Laws of 1895, owned and operated waterworks constructed and used for extinguishing fires, and other public purposes. It charged and collected reasonable tolls from those of its inhabitants who used the water. An acre and a quarter of land, situated in Unity at the outlet of Gilman pond, with a dam and appurtenances upon it, and a line of main pipe underground extending from the dam to the central village in Newport, formed a part of the works. The selectmen of Unity, in April, 1895, taxed to the plaintiffs the said land and appurtenances and the portion of said main pipe within the limits of Unity.

Albert S. Wait and Levi W. Barton, for the plaintiffs.

Ira Colby, for the defendants.

591 WALLACE, J. The question for decision is whether that portion of the waterworks owned by the town of Newport within the limits of the town of Unity is subject to taxation in the latter town. The act (Laws 1895, c. 169) which authorized the town of Newport to construct the waterworks contains no provisions in regard to their taxation. By section 3 of chapter 55 of the Public Statutes, "buildings, mills, carding machines, factory buildings and machinery, wharves, ferries,

toll-bridges, locks and canals, and aqueducts, any portion of the water of which is sold or rented for pay, are taxable, as real estate." This section of the statute in express terms subjects to taxation as real estate "aqueducts any portion of the water of which is sold or rented for pay." The town of Newport charges "those of its inhabitants who use the water reasonable tolls for the water used by them respectively." According to the plain terms of the statute, its waterworks are taxable as real estate, unless they are excepted as "real estate of the . . . town used for public purposes": Pub. Stats., c. 55, sec. 2. This last section in express terms exempts from taxation real estate of the town used for public purposes. Conceding that the waterworks of the town of Newport are used for public purposes, they are exempt from taxation by this statute, if this exception applies to property of a town outside its geographical limits. But the exemption extends only to real estate within the town, which is owned by it and used for public purposes.

⁵⁹² Prior to 1867, there was no provision of the statutes exempting the real estate of towns from taxation. In the revision of 1867 was introduced for the first time the material provision in regard to the exemption of town property from taxation. "Real estate . . . is liable to be taxed except . . . property of the state, county, or town": Gen. Stats., c. 49, sec. 2. This provision remains substantially the same: Gen. Laws, c. 53, sec. 2; Pub. Stats., c. 55, sec. 2. In 1867, towns had no general authority to purchase real estate outside their limits: Gen. Stats., c. 34, secs. 3, 4, 9. They might acquire land outside their limits as a gift or by levy in the collection of a debt, but they were not then authorized to buy land outside their limits, or even to acquire it by eminent domain. Subsequently, numerous towns and cities have been authorized to establish waterworks by acts broad enough to authorize them to take and condemn land outside their limits. If there were at the time of the revision of 1867 no statutes authorizing towns to purchase real estate outside their limits, it seems plain that the statute is not necessarily to be construed as exempting such property from taxation. The legislature could not have had it in mind. Hence, when they subsequently authorized towns and cities to acquire for public purposes lands in other towns, it cannot be justly presumed that they intended such property to be exempted from taxation.

The purpose of this statute of exemption was to avoid the assessment and collection of a tax upon the property of a town

used for public purposes by the people of the town, as on a pound or townhouse, for the reason that it would be a useless and unnecessary expense and trouble. But to interpret this statute so as to exempt the property of a town used for public purposes, which is situate in another town, is to extend the exemption beyond the reason and purpose of the statute. To thus interpret it, would be to give it a meaning which would make its operation unequal and not in accord with the spirit of our taxation laws, which are based upon the just and equal distribution of the burden of public taxes. It is not to be presumed that it was the intention of the legislature to accomplish so unjust a result as to deprive one town of its taxable property for the benefit of another, or that one town should be deprived of its right to tax property within its limits which was used for public purposes, in which it or its people had no interest and from which they derived no benefit, and which were beneficial alone to some other town and its people. This doctrine carried to its legitimate conclusion might practically bankrupt some of our smaller towns by depriving them of a very large portion of their territory upon which to exercise the power of taxation; as, for example, suppose the late Austin Corbin had given to the town of Newport his park, situate outside the limits of that town and embracing a large portion ⁵⁹³ of the area of several adjoining towns. It would require express terms to warrant a holding that one town can invade another and, by taking a portion of the territory for their own benefit, whether the purpose be in a legal sense public or private, subject the remaining lands of such town to a heavier burden of taxation. There is no competent evidence that this was the intent of the legislature, but, on the contrary, the evidence leads to the conclusion that it was their intention to limit the exemption to property of the town used for public purposes and situate within its limits.

In reaching this conclusion, the cases cited from other jurisdictions, as *Wayland v. County Commrs.*, 4 Gray, 500, *West Hartford v. Board of Commrs.*, 44 Conn. 360, *Rochester v. Rush*, 80 N. Y. 302, and other cases, have not been overlooked. Some of these decisions are based upon special statutes not applicable here, and some of them hold this kind of property exempt from taxation because it is used for public purposes. But this decision does not necessarily conflict with those, for the reason that it depends upon the special provision of our statute.

Petition dismissed.

All concurred.

TAXES—REAL ESTATE.—AQUEDUCTS, CONDUITS, PIPES, AND HYDRANTS used to distribute water among the citizens of a town, though supplied by a pumping station and reservoir in another town, are assessable and taxable as real estate in the town in which they are situate: *Paris v. Norway Water Co.*, 85 Me. 330, 35 Am. St. Rep. 371. See, also, *Union Water Power Co. v. Auburn*, 90 Me. 60, 60 Am. St. Rep. 240. Land is to be taxed in the taxing district wherein it is situated, though owned by nonresidents: See monographic note to *New Albany v. Meekin*, 56 Am. Dec. 524, on the place where property may be taxed.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

McMICHAEL v. WEBSTER.

[57 NEW JERSEY EQUITY, 295.]

MORTGAGES—REDUCTION FOR FRAUDULENT REPRESENTATIONS.—In an action to foreclose a purchase money mortgage, the mortgagor may claim a reduction of the mortgage debt if the quantity of the land covered by the mortgage has been fraudulently represented to be greater than that actually conveyed, and such representations have induced the purchase. Such defense may be made by answer without a cross-bill.

VENDOR AND VENDEE—FRAUDULENT REPRESENTATIONS—RESCISSION—ESTOPPEL.—A person induced to contract for the purchase of land by fraudulent representations as to its quantity, who acquires knowledge, or what is equivalent to knowledge, that the quantity of land named in the conveyance is not equal to that represented, or who is in possession of facts sufficient to put him on inquiry which would disclose the deficiency, is estopped by accepting the conveyance, to claim a rescission of the transaction.

VENDOR AND VENDEE—FRAUDULENT REPRESENTATIONS AS TO QUANTITY OF LAND—DEDUCTION IN MORTGAGE.—If a conveyance tendered by a vendor indicates that the quantity of land named therein is less than that represented, and the vendee calls attention to the deficiency and is assured by the vendor that the amount represented will pass by the conveyance because of accretions along the line of a tide-water boundary of the tract, the vendee may rely upon such representations without resorting to a survey, and, if they are made, knowing them to be false, he is entitled to a reduction in the purchase money mortgage given upon the land.

MORTGAGES—FORECLOSURE—WASTE—REDUCTION OF DEBT.—A mortgagee in possession as such may, by cross-bill on a bill to foreclose the mortgage, be compelled to account for waste of the mortgaged premises, and to submit to a reduction therefor from the mortgage debt.

MORTGAGES—FORECLOSURE.—WASTE by a mortgagee while in possession, not as mortgagee, but in some other right, is not a defense to the foreclosure of a purchase money mortgage.

L. M. Garrison, for the appellant.

S. M. Waln and J. W. Wescott, for the respondents.

²⁹⁶ MAGIE, C. J. The decree appealed from was made upon the advice of Vice-Chancellor Pitney, whose opinion is reported in *McMichael v. Webster*, 54 N. J. Eq. 478. In the opinion and the statement prefixed to it the questions raised in the cause are fully stated, and they need not be here repeated.

The decree is assailed as erroneous upon the ground that it abated from the principal sum of \$5,000, named in and secured by the mortgage given by Webster, the respondent, to *McMichael*, the appellant, the foreclosure of which was the object of the bill: 1. The sum of \$100 for waste committed by appellant upon the mortgaged premises after their sale by appellant to respondent; and 2. The further sum of \$3,178.80 for a deficiency in the quantity of land so sold, and awarded to appellant ²⁹⁷ the sum of \$1,721.30 only, for which, with interest, the mortgaged premises were decreed to be sold.

The claim of respondents to an abatement from the mortgage in the above and in other respects was set up by answer alone. There was no cross-bill. The insistent was that, upon a bill for the foreclosure of a mortgage given for purchase money, defenses of that character could be interposed by answer alone without cross-bill. The vice-chancellor held that the mortgage in question was a purchase money mortgage, and sustained the defenses to the extent above indicated.

Appellant questions the correctness of the decree in respect to both the deductions from the amount of his mortgage. It will be convenient to consider first that which was allowed by reason of a deficiency in the quantity of the land conveyed by appellant to respondents and upon which the mortgage was given.

Appellant does not contend that a claim for such an allowance cannot be set up by answer to a bill for the foreclosure of a purchase money mortgage, and in this course was well advised, for such a practice is, we think, established beyond dispute. In 1871 exceptions to an answer, interposed to a bill for the foreclosure of a purchase money mortgage, setting up fraudulent representations as to the quantity of title conveyed, were sustained by the chancellor on the ground that such a defense required a cross-bill. His action was affirmed in this court: *O'Brien v. Hulfish*, 22 N. J. Eq. 471. In the opinion of Chief Justice Beasley it was pointed out that, in accord with the strict

rules of equity practice, relief in respect to such fraud could only be obtained by an original or cross-bill. But as the reason for that practice was that without such a bill the mortgagee was deprived of the benefit of his answer to the charges of fraud, and as the utility of a bill in that respect had been lessened since the passage of the then recent statute authorizing a complainant to waive the verification of an answer by defendant, he suggested that the court of chancery might dispense with a cross-bill and establish a practice of setting up such a defense by answer alone.

Afterward, in 1876, the question came again before the court of chancery upon exceptions to an answer filed to a bill to foreclose ²⁹⁸ a purchase money mortgage, which set up as a defense a fraudulent representation of the quantity of land agreed to be conveyed. Chancellor Runyon, advertng to the fact that the practice of the court permitted a complainant in a cross-bill to call for an answer without oath and so deprive the complainant in the original bill of any benefit of an answer upon oath, and the further fact that the right to any such deductions could be tried on the answer alone without any prejudice to the complainant, applied the maxim "*Cessante ratione, cessat ipsa lex*," and overruled the exceptions: *Dayton v. Melick*, 27 N. J. Eq. 362. Upon final hearing of that cause, a decree was made for the mortgagee, not for the amount of his mortgage, but for an amount diminished by a deduction representing the difference between the quantity of land actually conveyed and that which the purchaser had been induced to believe he would acquire by his purchase, by reason of fraudulent misrepresentations of the seller: *Dayton v. Melick*, 32 N. J. Eq. 570. That decree was brought to this court by appeal, and two questions were thereby raised: 1. Whether such a defense was properly presented by answer without cross-bill; and 2. Whether the proofs established the defense. The decree was reversed, but solely upon the ground that the evidence was insufficient to establish the fact that fraudulent representations had been made. The practice of permitting a defense of that sort to be interposed by answer alone was expressly approved: *Melick v. Dayton*, 34 N. J. Eq. 245. That practice must be considered as settled.

The contention of appellant is that, conceding the correctness of this practice, it was improperly resorted to in this case because, as he claims, the mortgage of appellant was not a purchase money mortgage.

The transaction between the parties was an exchange of lands. The original contract was in writing, and by its terms respondents were to convey to appellant certain lands free from encumbrance and to pay him \$2,500 in cash. When the parties came to perform the contract, respondents were unable to make the cash payment, and it was mutually agreed that its payment should be deferred, and that respondents should give appellant their ²⁰⁰ bond for its payment at a future day and secure the bond by the mortgage in question. To this extent the mortgage was plainly a purchase money mortgage. But it was also ascertained at the same time that the lands which respondents had contracted to convey were encumbered to the extent of over \$2,500, and that they were unable to free them from those encumbrances. So it was further mutually agreed that appellant should accept the conveyance of those lands subject to such encumbrances, and that respondents should pay him the amount of such encumbrances as follows: All in excess of \$2,500, in cash, and \$2,500 at a future day, which \$2,500 was to be included in the above-mentioned bond and secured by the mortgage in question. The transaction as finally concluded was, therefore, this: The property which respondents had contracted to give in exchange unencumbered was recognized as diminished in exchangeable value by the amount of such encumbrances, and respondents were to make up the diminution by money, part paid at once and part to be paid in the future. Such money was clearly purchase money.

The vice-chancellor properly held the whole mortgage to be for purchase money.

It is next to be considered whether there was any error in the finding below that appellant fraudulently misrepresented to respondents the quantity of land which they were to acquire by the trade. I deem it unnecessary to discuss the proofs on that subject. The vice-chancellor saw the witnesses and heard their testimony. A careful examination of the case compels me to say that not only do I find no ground for dissenting from his conclusions, but that I entirely concur with him.

It is, however, strenuously contended that respondents are estopped from claiming any relief for an injury resulting from a deficiency in the land conveyed them. It is insisted that such estoppel arises because they had notice, or what was equivalent to notice, that the conveyance would not pass to them the quantity of land which has been represented, but a much less quantity, and that with such notice they accepted the conveyance.

When one who has been induced to enter into a contract by ³⁰⁰ false and fraudulent representations learns of the deception before the performance of the contract, doubtless he may refuse to perform it. If with knowledge, or what is equivalent to knowledge, of the fraud he proceeds to perform and obtains the benefit of a performance, he will not be permitted to rescind, but will be deemed to have elected to take what he got by the performance. This doctrine is illustrated by the case of *Turner v. Hout*, 53 N. J. Eq. 526, where there was a contract for the exchange of lands described in an attached memorandum, which contract was expressly declared to be binding on the parties only "if each property is found to be on examination as described herein." The attached memorandum contained a detailed statement of many improvements upon the land to be conveyed to Turner, the existence of which could be verified by observation. The proofs showed that Turner visited and examined, or had the opportunity to examine, that land and to observe the improvements thereon. Thereafter he accepted the contract by a memorandum in writing appended to it. Afterward he accepted the conveyance. A decree directing a reconveyance to Turner's representatives on the ground that the description of the property was false was reversed in this court. The memorandum of our decision does not specify the reasons for reversal, but, so far as the above-mentioned point is concerned, it went upon the ground that when Turner, having made, or had the opportunity to make, the examination the contract called for and to verify the description by his observation, afterward affirmed and performed the contract, he was estopped from rescinding it: *Turner v. Hout*, 53 N. J. Eq. 526; *Hout v. Turner*, 55 N. J. Eq. 593.

Whether the same doctrine is applicable to the partial rescission which results from making allowances or deductions from the thing contracted for because of misrepresentations need not be determined, for the facts do not justify the inference that respondents acquired any knowledge, actual or constructive, that the conveyance to them would pass a less quantity of land than had been represented before the conveyance was accepted.

The contention on this point is that the deed intended to be ³⁰¹ executed to convey appellant's land to respondents, which described the land by metes and bounds and as containing a fraction over one hundred and forty-nine acres, was in the hands of respondents or their agent for some days before its execution and delivery; that respondents thereby acquired knowledge that the tract did not comprise one hundred and

eighty-five acres, as had been represented, or if actual knowledge thereof was not acquired, that they were put upon inquiry, and such inquiry should have induced a survey which would have disclosed the truth, and that after such knowledge as was or ought to have been acquired by respondents they accepted the conveyance.

The vice-chancellor found upon the evidence that respondents had no actual personal knowledge that the description in the deed called for only one hundred and forty-nine acres or a fraction. This conclusion was, I think, entirely warranted, but is of little consequence because it appears that respondents' attorney, employed to examine the title and intrusted with the acceptance of the conveyance, did have knowledge of the fact. Such information doubtless put the intending purchasers on inquiry, and, under some circumstances, a reasonable inquiry might require a survey. But there were no such circumstances. The evidence amply justifies the conclusion of the vice-chancellor that respondents' agent, on discovering the description of the quantity of the land contained in the deed to be less than represented, called the attention of appellant to that fact, and that appellant then averred that the real quantity of land which the deed would convey was the one hundred and eighty-five acres previously represented and contracted for, and that the amount was made up by accretions along the line of a tide-water creek, which was a boundary of the tract. The description of the tract in the deed was such that if the represented accretions had been in fact made they would pass by it to the grantee. Respondents, having made inquiry and received this plausible explanation of the observed discrepancy, were obviously not bound to test its accuracy further. That such explanation was knowingly false was found below, and I concur entirely in that conclusion.

The result is, that a case for deduction from the mortgage debt ³⁰² upon this ground was clearly made out, and, as no question is made as to the amount allowed, the decree is to that extent correct.

It remains to consider whether the deduction from the mortgage debt made on account of waste of the mortgaged premises is open to the objection of appellant.

The waste claimed consisted in the removal from the mortgaged premises of some growing trees and some farm bridges and sheds by the mortgagee after the date of the contract of sale and in part after the delivery of the conveyance of the land.

A mortgagee in possession may doubtless be compelled to account for his waste of the mortgaged premises and to submit to a deduction therefor from the mortgage debt. Such allowance may be made upon a bill to foreclose the mortgage, if the claim is presented by cross-bill: *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Davis v. Flagg*, 44 N. J. Eq. 109. It does not appear that the court of chancery has adopted the practice of permitting such relief to be obtained by defendant by answer alone.

But an obvious essential to such relief is that the mortgagee, when committing waste, was in possession as mortgagee and not in some other right: *Davis v. Flagg*, 44 N. J. Eq. 109. Herein, in my judgment, is the infirmity of this branch of the decree. Part of the injury to respondents occasioned by appellant's acts was done while appellant was vendor in possession pending the performance of a contract of sale. The remaining injury was done after the delivery of the deed but while grantor remained in possession under a clause in the contract of sale. Prior to the delivery of the deed appellant was not mortgagee. After delivery he was mortgagee, but his possession was not under the mortgage, but under the contract.

For an injury done to the corpus of the estate while thus in possession appellant was undoubtedly liable to respondents and such liability could be enforced by an action at law. It created an independent personal demand in nowise growing out of the mortgage relation. It was therefore incapable of being interposed as a defense to a bill to foreclose: *Brown v. Coriell*, 50 N. J. Eq. 753, 35 Am. St. Rep. 789.

³⁰³ It results that this part of the decree cannot be sustained. The decree must, therefore, be reversed and a new decree made in conformity with these views.

VENDOR AND VENDEE—MISREPRESENTATIONS OF QUANTITY OF LAND.—Where a vendor fraudulently makes false statements as to the quantity of land conveyed, the purchaser, who relies upon them and makes no survey of the land, may recover payments made: *Roberts v. French*, 153 Mass. 60, 25 Am. St. Rep. 611, and note. Compare note to *Cottrill v. Krum*, 18 Am. St. Rep. 557. An executory contract for the sale of land may be rescinded by the vendee when he enters into possession, relying upon erroneous, though not fraudulent, representations of the vendor that it contains a certain number of acres, and finds that it contains a less number than represented: *Newton v. Tolles*, 66 N. H. 136, 49 Am. St. Rep. 593.

VENDOR AND VENDEE—MISREPRESENTATIONS OF QUANTITY OF LAND—PURCHASE MONEY.—When the vendor

has grossly misrepresented the amount of land conveyed, and he attempts to enforce a judgment for the purchase price, equity will relieve the vendee: *Bedford v. Hickman*, 5 Call, 236, 2 Am. Dec. 590. When misrepresentation is made as to quantity, though innocently, the purchaser is entitled to what the vendor can give with an abatement out of the purchase money for so much as the quantity falls short of the representation: *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 202. But no diminution of price for deficiency can be claimed, where land fronting on a bayou is sold by described metes and bounds, except the rear boundary, which is not defined, as containing a certain number of arpents: *Davis v. Millaudon*, 17 La. Ann. 97, 87 Am. Dec. 517.

VENDOR AND VENDEE—MISREPRESENTATIONS OF QUANTITY—ESTOPPEL.—Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations; but this principle does not apply where the vendor states as a positive fact of his own knowledge that the land conveyed contains a given quantity: *Note to Bostwick v. Lewis*, 2 Am. Dec. 81.

MORTGAGES—FORECLOSURE—SETOFF.—In an action to foreclose a mortgage, the mortgagor may set up his claim for damages for a breach of warranty of the mortgaged property in reduction of the amount due on the mortgage: *Note to Brown v. Coriell*, 35 Am. St. Rep. 792.

MORTGAGE FORECLOSURE—WASTE.—A mortgagee in possession, who commits waste by cutting and selling timber, should be charged on foreclosure proceedings with what he has received for the timber, without any deduction for the cost of the cutting and removing: *Whiting v. Adams*, 66 Vt. 679, 44 Am. St. Rep. 875, and note.

SCHMALZ v. WOOLEY.

[57 NEW JERSEY EQUITY, 303.]

CONSTITUTIONAL LAW—TRADEMARKS AND LABELS BY ASSOCIATIONS.—A statute providing "for the adoption of labels, trademarks, and forms of advertising by associations or unions of workingmen, and to regulate the same," does not violate a constitutional prohibition against the passage of special laws granting exclusive privileges.

CONSTITUTIONAL LAW—TITLE OF ACT.—A statute entitled "A further supplement to an act entitled 'An act to protect trademarks and labels,'" constitutionally expresses the object of such statute in its title as the protection of trademarks and labels, although there is, in fact, no prior act entitled, "An act to protect trademarks and labels."

CONSTITUTIONAL LAW—TITLE OF ACT.—Entitling an act a supplement to a former act complies with the constitution only when so much of the original title is recited as expresses the object of the proposed law, and, if that object be expressed, the constitution does not defeat the statute merely because it is erroneously styled a supplement.

TRADEMARKS BY ASSOCIATIONS.—A number of workmen engaged in the same branch of industry may band together for their mutual profit, in the pursuit of their common industry, and acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons, and such trademark is entitled to protection.

J. A. Beecher, for the appellant.

W. B. Guild, for the respondents.

304 DIXON, J. The bill in this case was filed in February, 1897, by the president of the Union Hat Makers' Association of Newark, for the use and benefit of all the members thereof, to enjoin the defendants from using a counterfeit trademark and label, made in imitation of a trademark and label which had been adopted and filed by the said association in accordance with the provisions of the several acts of the legislature passed in the years 1889, 1892, and 1895: Gen. Stats., p. 3678 et seq. The defendants demurred to the bill, and, the demurrer having been sustained, the complainant appeals.

The act of 1889 is entitled, "An act to provide for the adoption of labels, trademarks, and forms of advertising by associations or unions of workingmen and to regulate the same." It provides (section 1) that it shall be lawful for associations and unions of workingmen to adopt, for their protection, labels, trademarks, and forms of advertisement, announcing that goods manufactured by members of such associations or unions are so manufactured; (section 4) that every such association or union adopting a label, trademark, or form of advertisement, as aforesaid, shall file the same in the office of the secretary of state, by leaving two copies, counterparts, or fac similes thereof, with said secretary; and (section 5) that every such association or union adopting, etc., may proceed by suit in the courts of this state to enjoin the manufacture, use, display, or sale of any counterfeit of their label, trademark, or form of advertisement, and that all courts having jurisdiction thereof shall grant such an injunction.

305 The demurrants do not deny that the bill presents a case in conformity with this act, except in this respect, that under the act the bill should be filed by the association or all its members, and not by one member alone. In our opinion, the act empowers the association to proceed by suit, making it for this purpose a quasi corporation, and therefore does not, of itself, entitle a single member to maintain the action. But this objection is obviated by section 4 of the act of 1892, if valid,

which provides for the bringing of such proceedings in the name of any member duly authorized by the association or union for that purpose. We are therefore brought to the main questions raised as to these statutes.

The demurrants contend that the act of 1889 violates that provision of the constitution (article 4, section 7, paragraph 11) which forbids the passage of private, local, or special laws granting to any association, corporation, or individual any exclusive privilege, immunity, or franchise whatever. Their position is that, as the privileges of this act are confined to associations or unions of workingmen for the protection of goods manufactured by their members, and are not offered to other workingmen who may not choose to form associations or unions or to persons generally, the privileges are therefore exclusive and the act is special.

We do not agree to this conclusion. All the legislation of the state respecting societies, associations, and corporations is based upon the idea that privileges which are denied to single individuals may be conferred upon groups of persons, and nothing in the constitution was intended to subvert this doctrine. If the legislature offers to any class of persons privileges peculiarly appropriate to their class, on condition that several of them shall unite for the purpose of accepting and exercising them, the constitution will not thereby be infringed. The privileges of this act are offered to all workingmen engaged in the manufacture of goods who thus unite, and they relate to goods of every description manufactured by them. Certainly, workingmen engaged in the manufacture of goods constitute a distinct class of persons, and there ³⁰⁶ is a manifest appropriateness in enabling any of them who comply with the act to provide and protect a mark distinguishing the products of their labor and skill. Nor is it at all necessary that a similar privilege should be given to those who are not workingmen, but are only employers of workingmen. Such persons stand in a different class with respect to the exercise of those faculties which the legislature intended to foster.

We think this act is constitutional. The act of 1892, with its amendment of 1895, seems not to be exposed to the objection just considered, for their provisions extend to any persons and any association or union of workingmen adopting a label or trademark to distinguish any merchandise or product of labor made, packed, or put on sale by such persons, association, or union. But these acts are assailed on the ground that their

titles do not comply with that provision of the constitution (article 4, section 7, paragraph 4) which declares that "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

The title of the act of 1892 is, "A further supplement to an act entitled 'An act to protect trademarks and labels.'" That of the act of 1895 is "An act to amend an act entitled 'A further supplement,'" etc., quoting the title of the act of 1892. The objection urged is that there existed no act entitled, "An act to protect trademarks and labels," and therefore entitling these acts as supplements or amendments of such an act was misleading. But, conceding this, the inquiry is not concluded. The question still remains, Was the title misleading as to the object of the act—did not the title, in spite of its false assumption of the existence of a prior statute, fairly express the object of the proposed legislation?

On reading the act, it will be perceived that its object is to protect trademarks and labels, and that for this purpose it is a complete and independent enactment. To express that object in the title no particular form of words is required, nor is it ³⁰⁷ necessary that the object should be expressed with precision. It is enough if the title be so phrased as to inform the legislators and the public of the subject matter of the act. As was said by Mr. Justice Depue in *Grover v. Ocean Grove*, 45 N. J. L. 399, 404, "the standard uniformly adopted for determining whether the legislature has complied with the constitutional requirement is whether the title of the act is such that by it the members of the legislature are informed of the subject to which the act relates and the public notified of the kind of legislation that is being considered": *Bumsted v. Govern*, 47 N. J. L. 368; *Govern v. Bumstead*, 48 N. J. L. 612. Tested by this standard, these titles seem to be sufficient. They clearly indicate that the subject of legislation is trademarks and labels, and that the purpose is to protect them. True, they state that this is to be done in the form of supplements, but that does not affect the object of the statutes. In our legislation, a formal supplement to an act is not necessarily a statute which supplies defects in its predecessor. It may be one that abrogates the preceding enactments and substitutes radically different provisions. Hence the mere calling of an act a supplement to another designated act expresses nothing of its object. Thus, if

the title were, "A supplement to assembly bill No. 10, which became a law on July 4, 1876," the constitutional requirement would not be satisfied because the title would not at all express the object, while the title, "An act to define more accurately the crime of murder of the first degree," would fully express the object, although the act, in form and substance, were only a supplement to section 68 of the crimes act. Entitling an act a supplement to a former act complies with the constitution only when so much of the original title is recited as expresses the object of the proposed law, and, if that object be expressed, the constitution does not defeat the statute merely because it is erroneously styled a supplement.

We therefore conclude that these acts are valid so far as they are necessary to sustain the complainant's bill.

We also think that upon general principles the substance of the bill is sufficient.

³⁰⁸ It alleges that a company of journeymen hatters, calling themselves the Union Hat Makers' Association of Newark, New Jersey, have, in common with similar associations formed elsewhere, adopted a certain label or trademark of which the following is a copy:



that for ten years last past they have used said label or mark to designate and distinguish the hats made by members of the association by affixing it upon each of those hats, and that for about three years last past the defendants have used a fraudulent imitation of that mark upon the hats made and sold by them, thereby deceiving the public, violating the rights of the members of the association, and depriving them of large profits which they would otherwise have gained.

These allegations seem to present a case of inequitable infringement of the association's right of property in its trademark or label. In *McAndrew v. Bassett*, 4 De Gex, J. & S. 380, Lord

Westbury said: "The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: 1. That the mark has been applied by the plaintiffs properly—that is to say, that they have not copied any other person's mark and that the mark does not involve any false representation; 2. That the article so marked is actually a vendible article in the market; and 3. That the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description." These views received the approval of Lord Cairns, sitting in the court of appeal, in *Maxwell v. Hogg*, L. R. 2 Ch. 309 App. 307, 314, and accord with the great weight of authority on this much litigated subject. The present bill clearly sets out the adoption and proper application of the mark by the association and its fraudulent imitation for the interdicted purpose by the defendants. It is not so explicit as to the second ingredient mentioned by the learned chancellor, but the court does not need to be told that hats made by a company of journeymen hatters during ten years were actually vendible articles in the market; so much will be inferred.

But the objection urged by the defendants against the bill is that it does not allege, and the court cannot infer, that the journeymen owned the hats made by them, and it is insisted that ownership of the article to which the trademark is affixed is necessary to the acquisition of a right in the mark. To support this claim *Schneider v. Williams*, 44 N. J. Eq. 391, is cited. Some expressions in the opinion of the able judge who decided that case certainly give countenance to the present objection, but on consideration I think those expressions will appear to be unwarranted. Thus, in defining the means by which a person will acquire an exclusive right to a trademark, he says: "1. He must select or adopt some mark or sign not in use to distinguish goods of the same class or kind already on the market, belonging to another trader; 2. He must apply his mark to some article of traffic; and 3. He must put his article, marked with his mark, on the market." Now, it is undisputed that this association has complied with the first two of these requirements; only in respect to the third has it failed. It did not itself put upon the market its own articles marked with the label. But it is doubtful whether the learned judge intended this third requisite to be so strictly read, for he immediately added: "Mere adoption of a mark or sign and a public declaration by advertisement or otherwise that a person will, at a subsequent

time, put a particular thing on the market, **marked or distinguished in a certain way, create no right.** Until the thing is actually on the market, marked by the particular mark of the person intending to acquire a title, no property right in the mark arises." This seems to indicate that it was the actual marketing ³¹⁰ of the marked article, and not the person by whom it was marketed or owned, on which stress was laid. And why should this specific personal element be deemed important? The public object sought in the protection of trademarks is to bring upon the market a better class of commodities, and the means for attaining that object is by securing to those who are instrumental in supplying the market whatever reputation they gain by their efforts toward that end. The workman by whose handicraft the commodity is made is one of these instruments, just as is his employer who furnishes the raw material and owns and sells the finished product; and if the former is permitted by the owner to place upon the commodity a mark to indicate whose workmanship it is and thereby commend his workmanship to other employers, this license from the owner should be deemed a right against everybody else. His aptitude in his trade is his property, and if by a mark he can have it identified as his in the market, he may enhance its salable value and thus secure the same sort of advantage as his employer by similar means. No reason exists why this advantage should not be protected by the courts in the same manner and to the same extent as is the like advantage of the employer. The mere fact that one rather than the other of these persons has placed the product upon the market has no rational bearing upon the matter, for both alike have had the market in view in the efforts they have made and through those efforts the market is supplied.

A different objection to a suit of this nature was sustained in *Weener v. Brayton*, 152 Mass. 101, namely, that the label did not indicate by what persons the articles labeled were made, but only indicated that they were made by one of many persons who were not connected with each other in any business. The first clause of this objection would unduly restrict the law of trademarks as everywhere recognized, for it is established that, whatever be the quality indicated by a trademark, the mark need not point out the particular person from whom that quality is derived. The law has placed no limit upon the number of persons who may unite for business purposes and jointly acquire property in a trademark, and yet it is evident that, if there be ³¹¹ many, some of them may have no personal share in produc-

ing the article identified by the mark. The second clause in the objection assumes what does not appear to be true in the case before us. We understand from the bill that the members of the association represented by the complainant are connected together as journeymen hatters; that their skill in this trade and their mutual assistance in profiting by its practice form the motive and chief aim of their association. This connection is as clearly one for business purposes as is that of members in a partnership or of stockholders in a corporation. Although it is a comparatively novel species of relationship, it has become an established one, and therefore calls for the application of those general principles of law and equity which are applied to other species of business associations. According to these principles, we think a workman or a number of workmen engaged in the same branch of industry and banded together for their mutual profit in the pursuit of their common vocation, may acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons, and that a trademark so owned is entitled to the same protection as other trademarks.

The decree below should be reversed, and the demurrer overruled.

CONSTITUTIONAL LAW—TRADEMARKS.—A statute authorizing a union or association of workmen to adopt a trademark or label, to be used only on goods prepared by members of that association, does not conflict with a provision of the state constitution inhibiting the granting to any corporation, association, or individual of any special or exclusive right, privilege, or immunity: *State v. Bishop*, 128 Mo. 373, 49 Am. St. Rep. 569, and note.

TRADEMARKS.—AN UNINCORPORATED ASSOCIATION formed to promote the general welfare of its members, but which is neither a manufacturer nor a trader, cannot acquire a trademark in a label adopted by it: *McVey v. Brendel*, 144 Pa. St. 235, 27 Am. St. Rep. 625, and note. Compare *State v. Bishop*, 128 Mo. 373, 49 Am. St. Rep. 569.

STATUTES—TITLES TO.—The constitutional requirement that the subject of an act shall be expressed in its title is to be liberally construed; if there is doubt as to whether the subject is clearly expressed, the doubt should be resolved in favor of the validity of the act: *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64. For a full discussion of the question of title to statutes, consult the monographic notes to *Neundorff v. Duryea*, 25 Am. Rep. 239-246; *Bobel v. People*, 64 Am. St. Rep. 70-107.

MAGOWAN v. MAGOWAN.

[57 NEW JERSEY EQUITY, 322.]

DIVORCE—CONCLUSIVENESS OF DECREE AS TO RESIDENCE.—If a plaintiff in an action for divorce is required by statute to have been a bona fide resident of the state in which the action is brought for a fixed period of time, in order to enable him or her to maintain the action, the ascertainment by the court of the fact of such residence necessarily precedes a consideration of the merits of the case, and the determination of that question is final, not only in the courts of that state, but in every other jurisdiction where the validity of the judgment comes in question, unless such determination has been procured by fraud, but, if it has been so procured, it is without extraterritorial effect, and the decree must be treated as void in another state.

MARRIAGE AND DIVORCE—CHANGE OF DOMICILE FOR DIVORCE PURPOSES.—To effect a change of domicile for the purpose of obtaining divorce, not only must the residence at the place chosen for the new domicile be actual, but to the factum of residence there must be added the *animus manendi*.

F. C. Lowthorp and L. Satterthwait, for the appellant.

E. R. Walker, for the respondent.

322 GUMMERE, J. This is a bill for maintenance filed by the appellant against her husband. As an antecedent to the primary relief prayed for, she seeks to have declared void a decree of divorce rendered by the district court of the territory of Oklahoma, in a suit brought by her husband against her. Whether this decree can be disregarded and treated as a nullity by this court is the only question presented here for decision, for it is not denied that the **323** conduct of the respondent has been such as to entitle the wife to a decree of maintenance, unless it is justified by the Oklahoma judgment.

The ground upon which we are asked to disregard that judgment and declare it void is that the Oklahoma court had no jurisdiction over the subject matter of the suit in which its decree was rendered.

By the statute of Oklahoma its courts have jurisdiction in actions for divorce only in those cases in which the plaintiff has been an actual resident of the territory in good faith for ninety days next preceding the commencement of the action.

That the respondent not only was not a bona fide resident of that territory for ninety days next preceding his institution of the action for divorce, but that he never at any time resided there, is proved beyond the shadow of a doubt, and it is apparent, therefore, that the Oklahoma court was in fact without jurisdiction to render the judgment which the appellant now

seeks to avoid. We are told, however, that it appears by the recitals contained in the decree that the question whether the respondent was a bona fide resident of Oklahoma for the statutory period was considered and decided by the Oklahoma court in determining whether it had jurisdiction, and that a recital in a decree of divorce made by the court of another state, that the petitioner was a resident of that state for the statutory period, is conclusive in this state of the fact so recited. This, it is said by counsel, is the declaration of this court in *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 51 Am. St. Rep. 650.

An examination of the opinion in the case referred to will disclose that the rule there laid down is hardly so broad as is claimed. What we said in that case was that "where the plaintiff in a cause is required by statute to have been a bona fide resident of the state in which his action is brought for a fixed period of time, in order to enable him to maintain his action, the ascertainment by the court of the fact of such residence necessarily precedes a consideration of the merits of the case, and the determination of that question by the court is final, not only in the courts of that state, but in every other ³²⁴ jurisdiction where the validity of the judgment comes in question, unless such determination has been procured by fraud."

Accepting this as the true rule, it will be seen that whether or not we are bound by the adjudication of the Oklahoma court on the question of the respondent's domicile must depend upon whether or not such adjudication was procured by fraud. If it was rendered after all the facts bearing on that question had been fully and fairly submitted to the court, we must accept it as conclusive; but, if it was procured by fraud, we are not precluded by it from inquiring whether the respondent was not in fact a resident of this state at the time when he instituted his suit for divorce in the Oklahoma court, as is charged in the bill of complaint in this case.

Upon looking at the evidence, it appears, from the story told by the respondent himself, that he and his wife were residents of the city of Trenton, in this state, from the year 1879 until the latter part of July in the year 1895, and that the latter still resides in that city; that he then went to Oklahoma, but that he returned to Trenton on the 5th of August of the same year; that he went back to Oklahoma about the 2d of January, 1896, and remained there about two weeks, during which time he began his divorce proceedings, and then returned again to Trenton; that he went a third time to Oklahoma during the latter part of February, 1896, and remained there a week or ten days

and then again returned to Trenton, having on that occasion obtained his divorce. He says that his purpose in going to Oklahoma in July, 1895, was to become a resident, but it is very clear that if such was his purpose he failed to accomplish it. To effect a change of domicile not only must the residence at the place chosen for the new domicile be actual, but to the factum of residence there must be added the *animus manendi*: *Harral v. Harral*, 39 N. J. Eq. 285, 51 Am. Rep. 17. A reading of the evidence cannot fail to produce the conviction that when the respondent went to Oklahoma he had not the slightest intention of remaining there and making it his home, but that, on the contrary, his sole object was to obtain an apparent residence there for the purpose of enabling him to institute divorce proceedings against his wife, ³²⁵ and that during the whole period covered by those proceedings he was in fact a bona fide resident, not of Oklahoma, but of New Jersey. This being so, it is manifest that he must have procured the adjudication of the Oklahoma court on the question of his domicile either by intentionally withholding from that court the real facts or by the submission of false testimony. Either course was equally fraudulent and absolutely destroys the validity of the decree.

With the Oklahoma decree out of the way, it is not disputed that the appellant is entitled to a decree of maintenance.

The proofs, however, fail to disclose with any certainty the financial condition of the respondent. The decree appealed from will therefore be reversed and the record remitted to the court of chancery, with instructions to ascertain the faculties of the respondent and determine the amount which he shall pay for the support and maintenance of the appellant and her children in accordance with the rules and practice of that court.

DIVORCE—DOMICILE.—A divorce obtained in another state by a husband from a wife, who has always lived in the state of her desertion of him, is valid if he did not become a resident of the other state for the purpose of procuring the divorce: *Loker v. Gerald*, 157 Mass. 42, 34 Am. St. Rep. 252, and note. But a temporary residence in another state for the mere purpose of getting a divorce does not give jurisdiction: *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247. To effect a change of residence from one state to another there must be an actual removal, an actual change of domicile, with a bona fide intention of abandoning the former place of residence and establishing a new one: Note to *Berry v. Wilcox*, 48 Am. St. Rep. 715.

THE JUDGMENT OF ANOTHER STATE MAY BE CONTRADICTED as to facts necessary to give the court jurisdiction, and when it appears that such facts did not exist, the judgment becomes a nullity: Note to *Foshier v. Narver*, 41 Am. St. Rep. 879. A decree of divorce rendered by a court of another state having no jurisdiction is void: *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447.

BUTTLAR v. BUTTLAR.

[57 NEW JERSEY EQUITY, 645.]

HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION.—While separation between husband and wife in pursuance of mutual articles of agreement cannot be enforced by a court of equity, because against the policy of the law, yet the court will not suffer a husband, who has become possessed of the property of his wife by virtue of such an agreement, to avail himself of his own wrong in order to free himself from the duty to maintain her.

HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—ENFORCEMENT BY WIFE.—In a suit in equity brought by a wife against her husband to enforce a mutual agreement of separation between them, providing for payments of money by him for her separate support, founded upon a valuable consideration passing from her to him, the rules of evidence as applied in a court of law may be applied, and a defense which would be overruled at law may be overruled in such case in equity.

HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—ENFORCEMENT.—If husband and wife are separated under a mutual agreement providing for the monthly payments of money by him for her separate support, in consideration of his becoming possessed of her property, payments accruing under such agreement may be decreed in equity on behalf of the wife, on the ground that the husband's possession of her property for the purpose of her support fastens upon him the duty and obligation to maintain her. In such case, the husband may be required to satisfy out of the income of his business and property any deficiency arising in the amounts received by him from her property, required to meet his agreed monthly payments to her.

HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—ENFORCEMENT—OFFER TO RESUME MARITAL RELATIONS.—If husband and wife are living separate under a mutual agreement, his offer to return and resume marital relations with her, if duly proved, cannot defeat her right to recover in equity the arrears of payments due her under such agreement, while he retains the exclusive use and control of her property transferred to him by such agreement.

HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—OFFER TO RETURN.—An offer of a husband to return and resume marital relations with his wife, when they are living separate under a mutual agreement, is not established by his uncorroborated testimony that he sent his friends to make such offer.

J. I. Weller, for the appellant.

W. S. Stuhr, for the respondent.

649 VREDENBURGH, J. The bill prays the enforcement of an agreement between the parties, of which the following is a copy:

650 "This indenture made this thirty-first day of January, A. D. 1894, between Christian Buttlar, of the town of West Hoboken in the county of Hudson and state of New Jersey, party of

the first part, and Mina Buttlar of the same place, party of the second part.

"Whereas divers disputes and unhappy differences have arisen between the said party of the first part and his said wife, for which reason they have consented and agreed and hereby do consent and agree to live separate and apart from each other during their natural life, therefore this indenture witnesseth: that the said party of the first part, in consideration of the premises, and in pursuance thereof, hereby covenants, promises, and agrees to and with his said wife, that it shall and may be lawful for her, his said wife, at all times hereafter to live separate and apart from him, and that he shall and will allow and permit her to reside and be in such place or places and such family or families, and with such relations, friends, and other persons, and to follow and carry on such trade or business as she may from time to time choose or think fit; and that he shall not nor will at any time sue or suffer her to be sued for living separate and apart from him, or compel her to live with him; nor sue, molest, disturb, or trouble any other person whomsoever, for receiving, entertaining, or harboring her; nor shall or will at any time hereafter claim or demand any of her money, jewelry, plate, clothing, household goods, furniture (excepting one-half carpet, one bed and bedding complete, one sofa, four chairs and one clock, which are to remain the sole property of Christian Buttlar) or stock in trade which she now has in her power, custody, or possession, or which she shall or may at any time hereafter have, buy, or procure or which shall be devised or given to her, or that she may otherwise acquire, and that she shall and may enjoy an absolute disposition of the same as if she were a feme sole and unmarried, except the real estate hereinafter mentioned which is owned by them jointly.

"And further that the said party of the first part shall and will, well and truly, pay or cause to be paid for and toward the better support and maintenance of his said wife the sum of seventy-five dollars (\$75) per month, commencing on the first day of February next, and payable on the fifteenth day of each and every month, and which the said party of the second part does hereby agree and take in full satisfaction of her support and maintenance and all alimony whatever, and the said Mina Buttlar, in consideration of the said premises, and also for and in consideration of the sum of one dollar to her in hand paid, does hereby agree to and with her said husband, the party of the first part, that he shall be entitled to receive during the term of

his natural life all the rent, income, and profits of the property now owned by them in their joint names, known as Nos. 600, 602, 604, 606, and 608 Malone street, No. 339 West street, in the town of West Hoboken, and 654 and 656 First street, Hoboken, the said Christian Buttlar, however, to pay all taxes that may hereafter be levied or assessed against said real estate, interest that may hereafter become due on mortgages now held against said property, and also all repairs that may hereafter be required, excepting the painting of the outside of the buildings, to be done the coming spring, the expense of which the ⁶⁵¹ parties hereto are to bear jointly, each to pay one-half of the cost thereof, and the said Mina Buttlar further agrees to and with her said husband that she will pay the taxes against said premises for the year 1893, and also all water rents up to February 1, 1894, and said Christian Buttlar furthermore agrees that his said wife may occupy the first floor in the house known as No. 600 Malone street in the town of West Hoboken in the county and state aforesaid, until March 1, 1894, she to pay therefor the sum of seventeen dollars (\$17), when she is to vacate the same, it being, however, understood that should Mina Buttlar not vacate the said premises on or before the first day of March, then and in that case she is to pay the monthly rent of seventeen dollars (\$17) therefor, payable on the first day of each and every month in advance.

"And the said Mina Buttlar further covenants and agrees to and with her said husband to indemnify and bear him harmless of and from all her debts contracted or that may hereafter be contracted by her on her account, any and all money or moneys which the said Christian Buttlar may be compelled to pay on violation of this last-mentioned covenant shall be deducted from the monthly payments to be made to her for her maintenance and support. And the said Christian Buttlar further agrees to pay all assessments now in arrears against the said premises, to which the said Mina Buttlar agrees to contribute sixty-two and fifty one-hundredths dollars (\$62.50) to be paid by her to Christian Buttlar on or before May 1st next."

The complainant is the wife of the defendant, and because of her disability, by reason of her coverture, to sue in a court of law, seeks in a court of equity a decree compelling her husband to pay, under his covenants in the above-recited agreement, certain sums of money admittedly due to her and unpaid, and certain taxes assessed against her property. Her bill was dismissed by the decree below, and her appeal brings it before us for review.

While separation between husband and wife, in pursuance of mutual articles of agreement, will not be enforced by the decree of a court of equity, such separation being against the policy of our laws (*Miller v. Miller*, 1 N. J. Eq. 391; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302), yet the court will not suffer a husband, who has become possessed of the property of his wife by virtue of such agreement, to avail himself of his own wrong in order to free himself from the duty to maintain her. Even without any such consideration, stipulations in such agreement to pay ⁶⁵² money for a wife's support have always been regarded as enforceable in a court of equity in this state: *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302; *Miller v. Miller*, 1 N. J. Eq. 386. We agree with the opinion of the learned vice-chancellor who heard the cause in the court of chancery to the extent that this suit may be regarded, and, to use his expression, "must be considered, as a simple action for money due by contract"; but, notwithstanding this view, he felt constrained to hold that, having been brought in a court of equity, the defendant might avail himself of any equitable defense, and admitted evidence of the defense of "hard bargain" which, if offered in any court of law, would have been overruled. Does it follow because the wife has, perforce, brought her suit to assert her legal rights, under an agreement founded upon a valuable consideration, in a court of equity—to which forum her marital status forced her to resort under the penalty of a submission to a serious invasion of those rights—that they are to be determined by rules of evidence which would be rejected in a court of law? The instrument in question, dated January 31, 1894, was entered into between these two parties, directly with each other and without the intervention of trustees, and in this respect, as well as in its consideration, differs from the agreement which was the basis of the suit in *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, cited in the opinion below. It is founded upon a valuable consideration passing from the wife to the husband in the form of a conveyance or transfer under seal by her to him, for the term of his natural life, of the rents, income, and profits of certain real estate, consisting of houses and lots in Hoboken, New Jersey, of which they were jointly seised and possessed. They had two children, daughters of the marriage, one of whom was then twenty years of age and taught school so as to be self-supporting, but lived with her mother, and the other was twenty-four years old and was married and lived elsewhere. It will not be denied that the defendant's marital obligation to support his wife, to-

gether with her transfer of her property for that object to his use, furnished not only a legal, but also a valuable, consideration for his undertakings to that end expressed in this paper.

653 The following excerpt from this writing will exhibit sufficiently, perhaps, for the present purpose, the essence of that contract and the positive terms of the engagements of the parties, viz., that the defendant "will well and truly pay or cause to be paid for and toward the better support and maintenance of his wife the sum of seventy-five dollars (\$75) per month, commencing on the first day of February next and payable on the fifteenth day of each and every month, and which the said party of the second part [wife] does hereby agree and take in full satisfaction of her support and maintenance and all alimony whatsoever, and the said Mina Buttlar in consideration of the said premises and also for and in consideration of the sum of one dollar to her in hand paid, does hereby agree to and with her said husband, that he shall be entitled to receive during the term of his natural life all the rent, income, and profits of the property now owned by them in their joint names, known as Nos. 600, 602, 604, 606, and 608 Malone street, No. 339 West street, in the town of West Hoboken, and 654 and 656 First street, Hoboken, the said Christian Buttlar, however, to pay all taxes that may hereafter be levied," etc.

In pursuance of this writing, it is undisputed that the defendant took exclusive possession of the premises referred to, which he has ever since retained, made leases with tenants in his own name, collected all the rents, and has treated the premises in all respects as the sole owner thereof. It is also admitted by the defendant's answer and shown in the evidence that since and inclusive of November, 1895, he had failed to make the stipulated monthly payments to his wife, as well as to pay certain of the taxes against the property, his excuse, as alleged in his answer, being that "he did not have sufficient means to do so." It is clear that evidence offered in support of such a defense, if set up in any court of law in any action founded on this agreement, would have been overruled, and the question to be now determined is whether it should have been entertained in the court below. The reason which enables a married woman to assert a legal right in a court of equity is that to deny her such right is to deny her all remedy and redress for a wrong done her, such a denial being contrary to every system of jurisprudence, because at the foundation of the existence of all courts lies the ancient maxim of universal application, "Ubi jus ibi remedium."

Blackstone ⁶⁵⁴ in his "Commentaries," volume 2, book 3, page 109, translates it into the common law in these words, viz.: "It is a settled and invariable principle in the laws of England that every right when withheld must have a remedy, and every injury its proper redress." The rule, which has grown up in equity relating to the specific enforcement of contracts that the hardship of the contract may be set up as a defense, exists under the assumption that the party seeking specific performance and having the choice of remedies, either at law or in equity, rejected the remedy at law and selected a court of equity in preference to that of law, in order to obtain a more complete redress for the injury complained of. But in a case where no such choice can be made, where the injured party is confined to a court of equity or otherwise must go absolutely without redress through the courts, the reason of this rule ceases. It would, it seems to me, be a clear denial of a "remedy" to hold that in such a case the injured party is obliged to waive her rights at law. The complainant was entitled to the benefit of the rules of evidence which a court of law would have enforced; such suit is held to be a form of legal proceeding which is carried on in a court of equity merely because the legal right cannot be asserted in the form of a suit at law. In *Jenner v. Morris*, 3 De Gex, F. & J. 45, Lord Justice Turner, after quoting on this subject with approval from Lord Redesdale's treatise of pleading (*Mitford's Pleading*, 4th ed., 112, 134, and cases in support), said: "It is therefore an ancient head of jurisdiction of this court to interpose in cases in which the principle of the law gives a right, but the forms of the law do not give a remedy." And in that case the court allowed a setoff in equity founded upon the defendant's claim against the husband for money loaned to purchase necessities for the wife's support while separated from her husband, which the forms of law prevented him from recovering from the husband by suit at law: And see *Walker v. Simpson*, 7 Watts & S. 83, 42 Am. Dec. 216; *Jenner v. Morris*, 1 Drew. & S. 218; *Harris v. Lee*, 1 P. Wms. 482, 483.

If, however, this case is to be decided solely by the rules of evidence and practice as administered by a court of equity, no different result would be reached. Such an agreement, founded ⁶⁵⁵ upon a valuable consideration granted by its terms, is enforced by a court of equity in the wife's behalf, not only upon the general equitable ground laid down in the *Aspinwall case* (where there was no such consideration), but also for the reason that the husband's possession of the property of the wife fastens

upon him the obligation of maintaining her: 2 Story's Equity Jurisprudence, 6th ed., par. 1424, and cases cited. But, applying the rules relating to the specific performance of contracts in equity, the defendant seems to have no standing. Pomeroy, in his Equity Jurisprudence, volume 3, paragraph 1404, on this subject states the equitable rule to be that "where the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach," and, as approved and applied by the courts of this state both before and since the case of Plummer v. Keppler, 26 N. J. Eq. 482, the late Vice-Chancellor Van Fleet there stated the rule briefly as follows: "While the remedy by specific performance is discretionary, yet, when the contract has been fairly procured and its enforcement will work no injustice or hardship, it is enforced almost as a matter of course." Adopting these statements of the rule as a guide, was this contract fairly procured? That it was fairly procured is not denied by this defendant either in his answer or in his proofs. It was drawn at his own request, by his confidential lawyer and adviser, who was then and has ever since remained, not only in the court of chancery but also in this court, his chosen counsel. Nor has this defendant claimed that this paper was procured through any fraud, accident, or duress, nor has he at any time offered to rescind, revoke, or cancel it, nor to reassign to the complainant her share of the leasehold estates, or her reversionary interest in the rented premises, or to place her back in the situation she originally occupied with respect to her properties, with the right to collect in her own name the portion of the rents to which she was entitled. On the contrary, while still holding fast to all the benefits ⁶⁵⁶ derivable by him from the exclusive possession of her property granted him by the instrument, he seeks to repudiate the obligations it casts upon him. He could not, it seems to me, escape liability on his contract except by rescission, and that could be accomplished, if at all under present conditions, only by an offer, by way of a cross-bill, to restore the consideration.

Will the enforcement of this agreement work any injustice or hardship to the defendant? Its language is devoid of all ambiguity. There is nothing in it to suggest that his payments under it to his wife were to be limited to or conditioned upon

the amount of his net receipts of rents from the joint property, and no reason is perceived why he should not contribute from his private income to the fulfillment of his marital obligations, in accordance with this agreement, if that be necessary in order to make up a deficiency of rents. There is no evidence to show that the expressed sum of seventy-five dollars a month was excessive for the wife's proper maintenance. What the defendant's private income from his regular business amounted to must be, under the evidence, the subject of mere conjecture, for the whole account was in his keeping. He produced no cash-book or ledger to show the amount of his business dealings, and when pressed by cross-examining counsel as to whether his net income from his own business (feed-store business) was not more than seven hundred dollars a year, he answered, "I doubt it." In his unverified answer to the bill of complainant he states that the income from his business was "hardly sufficient to keep him," but he fails to state the amount of his receipts therefrom and his disbursements thereout, nor what sum he regarded as insufficient, so that the court could judge what sum should be regarded as sufficient. If his wife be correct in her testimony, his habits of life may have exhausted quite a considerable sum in order to maintain him in his peculiar style of living. It is not important to quote the testimony on this point. It is sufficient to say that it shows the separation arose not from any fault charged upon the complainant but from that of the defendant.

The adjudications in this state and elsewhere hold it to be firmly settled law that the husband is bound to support his wife, ⁶⁵⁷ where the two are separated by mutual consent, the same as where they are living in cohabitation, and even the same as where they are separated through his fault (1 Bishop on Marriage and Divorce, 578, and cases there cited); and it is held also that in separations resting only in parol and independently of any express agreement founded on a valuable consideration, the husband is bound to furnish his wife with such articles of food, apparel, medicine, and medical attendance, nursing, such provided means of locomotion, provided habitation and furniture, such provision for her protection in society, and the like, as the husband, considering his ability and standing, ought to furnish to his wife for her sustenance and preservation of her health and her comfort: 1 Bishop on Marriage and Divorce, par. 554, and cases cited in note.

The defendant does not pretend that the complainant's allowance was exorbitant or excessive in amount. After accepting

from her her means of support, and limiting her to a fixed monthly sum, and expressly providing that he should not be liable for any of her debts, he should not be heard to complain of the amount so fixed, especially in the absence of a fair and full statement to the court of his faculties. Even without such a provision in the contract, the defendant was protected against any liability for his wife's debts: *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302. In 1 Bishop on Marriage and Divorce, paragraph 580, it is declared to be the law that if the wife "engages to accept a small sum, which is paid her, though the sum be wholly inadequate, still so long as the separation continues on this footing, she cannot pledge his credit for anything, however much she may stand in need of the credit."

The defendant has not met the burden of proof which his defense has assumed on this branch of the case, and has utterly failed to show that his income from his business was not sufficient to enable him to supply therefrom any deficiency of the rents needed to satisfy his covenanted payments.

Again, under the circumstances of the transfer of this property to the defendant and his assumption of the exclusive possession of the joint properties, he was bound to use at least ⁶⁵⁸ ordinary care and diligence in its management, and cannot ask a court of equity to release him from losses of rental income in consequence of the want of such care. If, by his own fault, the rents fell short of their usual and former yield, he should not be heard in his defense of the alleged "hardship" of the contract. Upon this point I shall quote from the testimony of his housekeeper, John Barnecker, who had charge of the houses, and which I shall assume to be correct because the defendant, although afterward recalled to the witness stand, made no attempt either to contradict or explain it. This testimony was given as follows, viz.:

"Q. What was the cause of that [the nonfilling of the houses]? A. Mr. Buttlar would not repair the houses, inside or out; no carpets on the stairs; there was old oilcloth on the halls; and he would not do any repairing to them, and of course I could not.

"Q. Were there tenants willing to go in providing that was done? A. Yes, sir; and some would have stayed in if Mr. Buttlar done some repairs to them.

"Q. (By the Court.) That is, were willing to go in if he would fix them up? A. Yes, sir.

"Q. But refused to go in in their present condition? A. Yes, sir.

"Q. (By Mr. Weller.) And did you tell Mr. Buttlar? A. Yes, sir; two or three times.

"Q. What did he say? A. That he would not do anything until they were rented, and not before."

No one having the slightest experience in the renting of houses would expect parties either to become or remain tenants under appearances so forbidding unless definite promises of improvements were made by the owners to intending tenants previous to their occupation under the contract of renting. Such promises the housekeeper swears, without contradiction, he vainly endeavored to obtain from the defendant, and resulted in the refusal of tenants to occupy. Without extending this opinion unduly into further details of the evidence, it is sufficient to add that the defense of hardship interposed to the enforcement of the payment by the defendant of the sums of money provided for in the writing is not sustained.

³⁵⁹ The only other ground upon which the decree below is rested is that the defendant offered by his answer and evidence to resume marital relations with the complainant. Passing the question of the appropriate practice to be pursued, and dealing with it as if a cross-bill had been duly filed by the defendant and the complainant had the benefit of her answer upon the record, the evidence offered in support lacks requisite corroboration, if indeed there is any legal evidence upon the subject. That part of the defendant's case rests entirely upon his own testimony. He testifies that he made no offer, personally, to resume marital relations with the complainant, but that he "sent his friends" to make such an offer. He does not designate any person or persons as such authorized friends, nor does he state the date, or the terms, of any offer which he says he deputed them to make, nor does it appear that anyone ever in fact made any offer in his behalf to his wife upon the subject. But, even if the evidence had clearly shown the communication of a bona fide offer at any time from the defendant to the complainant to resume marital relations with her, her right to recover in this suit the arrears of payments due her under this agreement would not have been affected. The consideration of the contract having passed to the husband he could not, while still retaining it, and without offering to restore it, at will, relieve himself from the obligations assumed by him. Such attempt stands opposed to every principle of mutuality entrenched in the law of contracts.

The decree appealed from should be reversed and a decree rendered in favor of the complainant for the amount due according to the terms of the contract.

HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION.

A deed of separation made between husband and wife is valid only when made through the agency of a trustee: *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358. But such agreements have been sustained without the intervention of trustees: Note to *Stephenson v. Osborne*, 90 Am. Dec. 368, 369; and in New York it has been held that an agreement between a husband and wife, providing that his property shall be sold and one-third the proceeds paid to her, and that they should live separate, is enforceable at the instance of the wife for her share of the proceeds: Note to *Galusha v. Galusha*, 15 Am. St. Rep. 459. An agreement between a husband and wife, made through the medium of a trustee, for their separation and an allowance for her support, can be enforced by the trustee in an action to recover any sum due from the husband by the terms of the agreement: *Clark v. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733.

HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION.

AN OFFER OF THE HUSBAND to cohabit with his wife, after separation under a mutual agreement, does not end the contract for separate maintenance; she may refuse to return to him, and abide by the terms of the agreement. But if the wife returns and is received by the husband as his wife, the agreement to live separate is at an end and with it falls the bond for her separate maintenance: Note to *Stephenson v. Osborne*, 90 Am. Dec. 369, 370.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

GREEFF v. EQUITABLE LIFE ASSURANCE SOCIETY.

[160 NEW YORK, 19.]

PLEADING—ADMISSION BY DEMURRER.—Although a demurrer to a complaint admits all the facts alleged, and such inferences as may be fairly drawn from them, it does not admit any of the conclusions averred nor any construction put by the pleader upon the instrument pleaded. Neither does it admit the correctness of any inference drawn by the pleader from the facts alleged.

PLEADING—SETTING FORTH CONTRACT—EFFECT OF. If an action is brought upon a contract, which is set forth, the rights of the parties must be determined by the terms of that instrument so far as they are dependent upon it.

INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—APPROVAL OF ATTORNEY GENERAL.—Under a statute which prohibits any action for an accounting from being brought against a life insurance company, or any action against it which interferes with its business, except upon the application or approval of the attorney general, an action by a policy-holder to recover a proportionate share of the company's surplus, brought without such application or approval, cannot be maintained unless the facts stated are sufficient to entitle the plaintiff to recover in an action at law upon the policy as an instrument for the payment of money, or to recover against the defendant for a breach of its contract.

INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—ESTOPPEL.—If the parties to a contract of life insurance agree that the policy-holder shall be entitled to participate in the distribution of the company's surplus, according to the methods and principles adopted by the company for the distribution of surplus, the policy-holder is bound by his contract, and cannot, after he has expressly ratified and accepted such methods and principles, maintain an action at law to recover a proportionate share of accumulated surplus over and above the amount of surplus distributed to the policy-holders, reserved by the company in accordance with its methods and principles for the distribution of surplus.

INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—PREREQUISITE—ASCERTAINMENT OF PROPORTION.—Under a contract of life insurance, which provides that the policy-holder shall be entitled to share in the distribution of the company's surplus, according to the methods and principles adopted by the company for the distribution of surplus, and under which only such proportion of the surplus as equitably belongs to the policy is to be credited to it and paid to the policy-holder, the proportion designated must be ascertained and determined before the policy-holder can maintain an action at law to recover any portion of the surplus.

INSURANCE—LIFE—EQUITABLE SHARE OF SURPLUS—DISTRIBUTION—DISCRETION.—If the charter and policy of a defendant life insurance company do not require it to distribute its entire surplus among its policy-holders, but only to credit to each policy an equitable share of the surplus, after deducting an amount sufficient to cover all outstanding risks and obligations, the company has the right to retain out of the fund remaining in its hands, though denominated by it as "surplus," instead of a reserve fund, an amount sufficient to insure the security of its policy-holders in the future as well as present, and to cover any contingencies that may arise, or which may be fairly anticipated; and the question as to how much of the surplus shall be distributed to the policy-holders and how much shall be accumulated and retained for the security of the company, must be decided by its officers and managers, who are to exercise their discretion in determining it, and the courts will not interfere where there has been no bad faith, willful neglect, or abuse of discretion, for such determination must, *prima facie*, be regarded as an "equitable" apportionment of the surplus.

INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—CONDITION PRECEDENT—LEGAL TITLE.—In an action upon a contract of life insurance, which provides that the policy-holder shall be entitled to share in the distribution of the company's surplus, according to the methods and principles adopted by the company for the distribution of surplus, the policy-holder cannot recover a specific portion of the accumulated surplus held by the company without showing some legal title to, or interest in, the fund, and this is not shown by an allegation in his complaint that, if the fund is divided, as an amount in which he had an interest was previously divided, he would be entitled to receive the sum mentioned in the complaint.

Action brought by Greeff against the defendant society to recover an unpaid balance of a share of its net surplus, to which the defendant alleged himself to be entitled. There was an interlocutory judgment entered upon a decision of the trial court, which sustained a demurrer to the complaint. This judgment was reversed by order of the appellate division of the supreme court, which entered an interlocutory judgment overruling the defendant's demurrer, and the defendant appealed, by permission, from such order and judgment. The question certified was as follows: "Does the complaint in this action state a cause of action?"

William B. Hornblower and Charles B. Alexander, for the appellant.

Dickinson W. Richards, for the respondent.

25 MARTIN, J. The question of the sufficiency of the plaintiff's complaint has been certified to this court by the appellate division and presents the only question to be determined upon this appeal. The importance of this case requires a careful and studious consideration of that question and of the principles involved in its determination. Its importance arises, not so much from the amount at issue in this particular case, although it is large, as from the principles to be established by its decision. The determination of the principles involved will not only affect existing contracts amounting to many million dollars, but may disturb the methods and basis upon which vast business transactions have hitherto been conducted, and create confusion and disorder in a system under which an important branch of business has been transacted for at least a half century.

The defendant was organized in 1859 under an act of the legislature providing for the incorporation of life insurance companies, passed June 24, 1853, with a capital stock of \$100,000, upon which, under its charter, its holders might receive not to exceed seven per cent per annum, and the earnings and receipts of the company, over the dividends, losses, and expenses were to be accumulated by it. Its corporate powers were vested in a board of directors, who were authorized to select from among their number a president and vice-president, and to appoint a secretary and such other officers as they might deem requisite. They were given power to enact by-laws, rules, and regulations for the government of the officers and agents of the company and for the management of its affairs, to determine the rates of premiums, the amount to be insured upon any one life, and the terms of such insurance. The charter also provided that the insurance business of the company should be conducted on the mutual plan, and that all premiums should be payable in cash. In case a policy-holder should omit to pay any premium due from him, or should violate any other condition of the policy, the board of directors might forfeit his policy and apply all previous payments ²⁶ to the benefit of the company. It also provided: "The officers of the company, within sixty days from the expiration of the first five years from December 31, 1859, and within the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, which shall exhibit its assets and liabilities, both present and contingent, and also the net surplus,

after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policy-holder shall be credited with an equitable share of the said surplus. Such equitable share, after being ascertained, shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself), expressing the reversionary value of such equitable share, at such interest as the directors may designate, or if any policy-holder so direct, such equitable share of surplus shall be applied to the purchase of an annuity, at such rate of interest as the directors shall designate, to be applied in the reduction of his or her future premiums. In case of death, the amount standing to the credit of the party insured, at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; and the proportion of surplus equitably belonging to him or her, at the next subsequent striking of balance, shall also be paid, when the same shall have been ascertained and declared."

In 1868, by chapter 118 of the laws of that year, a statute was enacted which provided that any domestic insurance corporation which, by its charter or articles of association, is restricted to making a dividend only once in two or more years, may hereafter, notwithstanding anything to the contrary in such charter or articles, make and pay over dividends annually, or at longer intervals, in the manner and proportions, and among the parties, provided for in such charter or articles.

Chapter 100 of the Laws of 1872 provided that: "It shall be lawful for any life insurance company organized under the laws of this state to ascertain at any given time, and from ²⁷ time to time, the proportion of surplus accruing to each policy from the date of the last to the date of the next succeeding premium payment, and to distribute the proportion found to be equitable either in cash, in reduction of premium, or in reversionary insurance, payable with the policy, and upon the same conditions as therein expressed at the next succeeding date of such payment; anything in the charter of any such company to the contrary notwithstanding."

On the first day of July, 1882, the plaintiff entered into a written contract of insurance with the defendant, whereby it, in consideration of the statements contained in the plaintiff's application and the payment of the premium mentioned therein, promised to pay to the plaintiff or his representatives on May 2, 1897, or upon his death if it occurred before then, the sum of \$20,000. Among the provisions and requirements in-

dorsed upon and made a part of the policy, and relying upon which it was issued and received, was the following: "This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this society, by way of increase to the amount insured, according to such principles and methods as may from time to time be adopted by this society for such distribution; which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract; but the society may at any time before a forfeiture, upon request of the person holding the absolute legal title to this policy, substitute a cash payment to be fixed by said society in lieu of the said increase to the amount insured, to be used in reduction of subsequent premiums."

All the conditions of the policy were kept and performed by the plaintiff on his part. The defendant annually, within sixty days from the thirty-first day of December in each year, from 1882 to 1896, both inclusive, caused a balance to be struck of the affairs of the society, exhibiting its assets and liabilities, both present and contingent, and also the net surplus after deducting a sufficient amount to cover all outstanding risks and other obligations. Such net surplus ascertained²⁸ and declared by the defendant in each of the several years was for the year 1882, \$8,078,495, and in each subsequent year a larger amount, until 1896, when the amount was \$43,277,179. During the years mentioned the defendant distributed to the plaintiff a reversionary insurance, payable with the policy and on the conditions therein expressed, as the plaintiff's proportion of surplus accruing from the date of the last to the date of the next succeeding payment, amounts varying from \$243 to \$328, making a total of \$3,932.

The several divisions of surplus distributed to the plaintiff were from sums received in excess of the several amounts mentioned as the balance of the surplus for each year, so that each distribution of surplus has been from profits accruing during the year without diminishing the surplus on hand at the end of the preceding year, and the plaintiff has received no portion of the net surplus of \$43,277,179 ascertained and declared by the defendant as the amount on hand December 31, 1896.

According to the principles and methods adopted by the defendant for distribution of surplus there was distributed to the plaintiff in the year 1895 \$328, as his proportion of a distribution of surplus amounting to \$2,002,954.23, and the proportion

due the plaintiff of the \$43,277,179, net surplus ascertained on December 31, 1896, according to the same principles and methods, which were the principles and methods in force during the life of the plaintiff's policy, is \$7,087.38, in addition to the amount of surplus actually awarded of \$3,932, making a total of \$11,019.38 of surplus, and \$20,000 of principal.

On June 23, 1897, the defendant paid to the plaintiff the sum of \$23,932 and certain interest thereon, and an agreement was then and there made between them that such payment should not prejudice the right of the plaintiff to claim that he is entitled, under his policy, to a further and greater sum by way of surplus or profits, and there still remains due from the defendant to the plaintiff, under and by virtue of said policy, the aforesaid sum of \$7,087.38 and interest thereon ²⁹ from the second day of May, 1897, no part of which has been paid, although payment thereof was duly demanded prior to the commencement of this action.

The foregoing are all the material averments of the complaint, and include the provisions of the policy, the charter, and the various statutes, so far as they apply to the policy in suit or are referred to in the complaint.

This examination discloses that, after alleging the incorporation of the defendant, the provisions of its charter, the statutes relating to the subject, the issuing of the policy, its provisions, the plaintiff's performance of all its conditions, and after eliminating the conclusions and inferences of the pleader, there remain in the complaint the allegations as to the surplus for each year from 1882 to 1896, the amount which was distributed to the plaintiff during those years from profits other than were included in such surplus, the distribution to the plaintiff in 1895 of \$328 as his proportion of a surplus of \$2,002,954.23, and that his proportion of the \$43,277,179 surplus in 1896 would be \$7,087.38 if it was distributed in the same manner.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. By interposing this demurrer, it admitted all the facts alleged and such inferences as could be fairly drawn from them: *Moss v. Cohen*, 158 N. Y. 240; *Coatsworth v. Lehigh Valley Ry. Co.*, 156 N. Y. 451; *Sanders v. Soutter*, 126 N. Y. 193; *Marie v. Garrison*, 83 N. Y. 14; *Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493, 503; *Sage v. Culver*, 147 N. Y. 241, 245; *Kley v. Healy*, 127 N. Y. 555. But it admitted none of the conclusions averred, nor any construction put upon the contract by the

pleader. Nor did it admit the correctness of any inference drawn by the pleader from the facts alleged. The contract having been set forth, the rights of the parties must be determined by the terms of that instrument, so far as they are dependent upon it: *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328.

³⁰ At the threshold of this examination, it is proper to observe that, under the provisions of section 56 of the insurance law (Laws 1892, c. 690), the plaintiff cannot maintain an action or proceeding for an accounting or enjoining, restraining, or interfering with the prosecution of the business of the defendant or for the appointment of a receiver, except upon the application or approval of the attorney general. That statute declares: "No order, judgment, or decree providing for an accounting or enjoining, restraining, or interfering with the prosecution of the business of any domestic insurance corporation, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney general, on his own motion or after his approval of a request in writing therefor of the superintendent of insurance, except in an action by a judgment creditor or in proceedings supplementary to execution." This act was doubtless passed to firmly establish and effectuate the decision of this court in *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 4 Am. St. Rep. 482. In *Swan v. Mutual Reserve Fund Life Assn.*, 155 N. Y. 9, we held that the action was for an accounting; that it would result in an interference with the prosecution of the business of the corporation, and was within the prohibition of the foregoing statute. It was also held that a policy-holder had no legal capacity to maintain such an action since the adoption of that statute; that it must be brought, if at all, by the attorney general, and that the statute did not violate any constitutional rights of a policy-holder or member. Therefore, if this action is to be regarded as an action for an accounting or as interfering with the prosecution of the defendant's business, it is prohibited by statute, as there is no allegation, claim, or pretense of any application or approval by the attorney general.

In considering whether the complaint states facts sufficient to constitute a cause of action, the point to be determined is whether the facts stated are sufficient to entitle the plaintiff to recover in an action at law upon the policy as an instrument for the payment of money, or to recover against the ³¹ defendant for a breach of its contract. This renders necessary a some-

what critical examination of the provisions of the policy relating to the defendant's surplus and the manner of its distribution.

The contract provides that the plaintiff's policy, during its continuance, shall be entitled to participate in the distribution of the surplus of the society according to such principles and methods as may from time to time be adopted by it for such distribution, and these principles and methods were expressly accepted and ratified by the plaintiff for himself or any other person having an interest in the policy. Thus, by the terms of the plaintiff's contract, he expressly ratified and accepted the principles and methods which were from time to time adopted by the defendant for the distribution of such surplus.

The plaintiff's claim, that the whole surplus should be distributed, cannot be sustained if it is in conflict with the provisions of the contract between the parties, without making a new contract for them, which the court will not do. Therefore, this question depends for its solution upon a proper interpretation of the provisions of the policy. The parties agreed that the plaintiff should participate in the distribution of the surplus according to the methods and principles adopted by the company. It is to be observed that the agreement was that the plaintiff should participate, not in the whole surplus, but in the distribution of the surplus, or, in other words, in the surplus which, according to the defendant's methods and principles, was to be distributed. We find nothing in the record to sustain the suggestion of the learned appellate division to the effect that the minds of the parties did not meet as to that provision in the contract. It was clearly a part of it, which was presumptively understood and deliberately entered into by them. Surely there is nothing in the complaint to indicate that any of the provisions of the policy were not fully understood by the plaintiff and intended to be an effective part of it.

The principles and methods by which the defendant distributed its surplus are set forth in the complaint. It discloses ³² that the defendant has never divided among its policy-holders its entire surplus, but has uniformly since 1882 retained a portion thereof in its own hands. The purpose for which it was retained does not appear. It may have been to insure the defendant's continued solvency and thereby to more fully protect the holders of its policies, or because the fund so retained was dedicated to other classes of insurance, or to its annuity fund. Presumptively, it was for some proper and lawful purpose.

It is manifest that by the terms of the plaintiff's policy the only right he acquired was to share in an equitable distribution of the accumulated surplus. Until a distribution was made by the officers or managers of the defendant, the plaintiff had no such title to any part of the surplus as would enable him to maintain an action at law for its recovery. We think the principles which control the disposition of the surplus earnings of a stock corporation are applicable here. In those cases it has often been held that until dividends have been declared, a stockholder has no right of action at law to recover any part of the fund applicable to that purpose, and that when directors have exercised their discretion in regard thereto the courts will not interfere unless there is bad faith, or willful neglect, or abuse of such discretion: *Cook on Stock and Stockholders*, sec. 542, note 5, secs. 272, 542, 545; *Williams v. Western Union Tel. Co.*, 93 N. Y. 162; *McNab v. McNab etc. Mfg. Co.*, 62 Hun, 18; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Boardman v. Lake Shore etc. Ry. Co.*, 84 N. Y. 157; *Thomas v. New York etc. Ry. Co.*, 139 N. Y. 163; *Day v. Ogdensburgh etc. R. R. Co.*, 107 N. Y. 129; *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647. Those principles were recognized by Goodrich, P. J., in his dissenting opinion in this case. He says: "In general, only the directors of any corporation have the power to decide what amount or share of its earnings is to be applied in dividends, and I can see no different principle which limits the authority of the directors of this society to decide what part of the net surplus is to be distributed to the ³³ policy-holders at any particular period." As there is in the complaint in this case no allegation of bad faith, willful neglect, or abuse of discretion by the defendant or its officers, it seems clear that under the principle of these authorities this action cannot be maintained.

The learned appellate division, while it admitted that the defendant had a large discretion in determining the amount of its surplus, and that it might increase its reserve fund for the security of its policy-holders and to cover any contingent liabilities that might arise, taking such steps and adopting such principles and methods as were demanded by a wise and prudent management to insure the prompt payment of losses and to successfully carry on and extend its business, still held that as the fund remaining in the defendant's hands had been denominated by it as surplus, instead of a reserve fund, all the usual powers and authority of its directors and managers to determine how and when it should be distributed, and all their discretion as

to the manner of its disposition, were spent, and hence they were required, as matter of law, to distribute the entire amount among its policy-holders. We are not disposed to agree with that conclusion. We think this case should not be decided upon any such narrow or technical ground. It should be determined upon a fair interpretation of the intent and purpose of the provisions of the policy, and not by giving to a single word an undue, unusual, or exaggerated effect. In a sense, all the funds in the possession of a mutual insurance company, over and above its immediate and present liabilities, may be regarded as surplus, yet it is not for that reason understood as belonging to, or to be immediately distributed among, the policy-holders, either by them or by the company. If the same exaggerated meaning were to be given to the word "liabilities" when applied to demands against the company as was given to the word "surplus," it would include the full face amount of all its outstanding risks or policies, and no surplus would ever exist. The word "surplus," like the word "liabilities," has acquired a special meaning in this branch of the insurance business. ³⁴ Under the provisions of this policy, it is plain that the surplus and the distributable surplus are regarded as two distinct and separate funds. The liabilities of a life insurance company are calculated upon rules based upon experience, which are dependent upon various contingencies. As applied in that class of insurance, the liabilities of a company do not represent the full amount of outstanding policies. So the word "surplus" is used to designate the amount of funds in the hands of the company after deducting its liabilities as ascertained by certain rules adopted by the insurance department for determining the value of each risk. Obviously, the word "surplus" was not used in the defendant's charter or policy to designate the amount of money in the company's hands which was to be distributed among its policy-holders, but to represent the amount which should remain after certain calculated liabilities were deducted. When that amount was ascertained, it became the duty of the officers of the defendant to determine the portion of such surplus which should be distributed and the portion which should be retained for the benefit and security of the company and its members. We find nothing in the policy which requires the defendant to distribute its entire surplus among its policy-holders. It is only required to credit to each policy an equitable share of the surplus, after deducting an amount sufficient to cover all outstanding risks and obligations. Under that provision the defendant had the

right to retain out of its surplus an amount sufficient to insure the security of its policy-holders, in the future as well as at present, and to cover any contingencies that might arise or be fairly anticipated. Obviously, it could not have been the intent of this provision to require the defendant to distribute its entire surplus, so that any depreciation in its investments or increase of its liabilities by some unusual condition, or any change of the rate of interest in calculating its reserve, would, of necessity, render it insolvent. The policy-holder is to be credited only with an equitable share of such surplus, which must, we think, be regarded such a share as might, with due regard to the safety of all its ³⁵ policy-holders, the security of its business, and in the exercise of a proper discretion, be thus credited. The adoption of principles or methods for the distribution of its surplus by which it was all distributed each year would not only place in jeopardy the security of every existing policy, but its tendency would be to prevent any increase of its business by obtaining new policies, and thus diminish its future receipts. It was essential to the prosperity of the defendant, and, consequently, to the security of its policy-holders, that its business in the future should be increased, or at least maintained, as upon its maintenance its continued solvency and ability to pay future losses principally depended. No prudent person would be inclined to take a policy in a company which had so improvidently conducted its affairs that it only retained a fund barely sufficient to pay its present liabilities, and, therefore, was in a condition where any change by the reduction of interest upon, or depreciation in, the value of its securities, or any increase of mortality, would render it insolvent and subject to be placed in the hands of a receiver. The evident purpose of the provisions of the defendant's charter and policy relating to this subject was to vest in the directors of the corporation a discretion to determine the proportion of its surplus which should be divided each year. Assuming, then, that a discretion as to the amount of the surplus which should be distributed rested in the officers of the defendant, it cannot be said that the plaintiff is entitled, as matter of law, to recover the amount claimed in his complaint.

While the complaint alleges that the defendant declared its surplus to be more than \$43,000,000, there is no allegation as to the amount of its outstanding policies or the proportion which the surplus bears to the amount of its existing insurance. Nor does it show that the surplus is in any way disproportionate or unnecessary to the proper security of the amount of such out-

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standing insurance. If, as was stated upon the argument, the amount is \$1,000,000,000, the surplus would be only about four and three-tenths per cent ³⁰ of the amount of its contingent liabilities. Therefore, there is nothing in the complaint to show that the surplus is more than should be retained by a prudent management for the security and benefit of its policy-holders.

It is said that the charter provides for a distribution of the entire surplus when ascertained. We find no such provision in it. What it does provide is that when ascertained each policy-holder shall be credited with an equitable share of the surplus, to be determined and applied in the manner stated, and that the earnings and receipts over and above the dividends, losses, and expenses shall be accumulated. Hence, if we assume that the charter and not the contract is to control (which we by no means hold), then the question at once arises who is to determine what an equitable distribution of the surplus is. Or, in other words, the question is, Who is to determine how much of the surplus shall be distributed to the policy-holders and how much shall be accumulated and retained for the security of the society and its members? Manifestly, that question is to be decided by the officers and managers of the defendant, who are to exercise their discretion in determining it, having in view the present and future contingencies of the business. In the absence of any allegation of wrongdoing or mistake by them, their determination of the question must be treated as proper and their apportionment of the surplus is *prima facie* to be regarded as equitable: *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 4 Am. St. Rep. 482.

There is no allegation that the amount of the fund held by the defendant is greater than is required by a prudent management to meet the possible and probable emergencies of its business, nor that the plaintiff has been inequitably treated as between himself and the defendant's other policy-holders. Whether the discretion exercised by the defendant's officers was or was not equitable could not be determined by the court, unless an accounting by the defendant was had, and after a full investigation and ascertainment of the exact situation and condition of its affairs. Confessedly, that was not the purpose of this action.

³⁷ Moreover, when the plaintiff obtained his policy, he knew, or, at least, could have easily ascertained, what principles and methods the defendant adopted in the distribution of its surplus, and that they were the same as were employed by all the

successful mutual insurance companies doing business in this state. Presumptively, the plaintiff knew that the defendant had an undistributed surplus amounting to more than \$8,000,000 at the time his policy was issued, and that it was an added security thereto. That fact may very well have been an inducement to him to take a policy in the defendant's company. Thus, it is quite evident, not only that the plaintiff knew that the society accumulated a portion of its surplus each year, but that, independently of the provisions of the policy, he understood and consented to the principles and methods adopted and carried out by the defendant in its distribution.

Furthermore, the facts alleged fail to show that the plaintiff was entitled to any portion of the undistributed fund. The substance of his allegations as to that fund and its distribution is that, by the defendant's distribution of a portion of its surplus in 1895, his proportion of \$2,002,954.23 was \$328, and that if the fund of \$43,277,179 was distributed in the same manner, \$7,087.38 would be placed to the credit of his policy. He, however, fails to allege any facts which show that any surplus which was not credited to his policy was available for or could properly or equitably be thus employed. The remaining fund may have equitably belonged to other policy-holders who held a different kind of policy and who belonged to a separate class to which it was properly dedicated. This fund may have been, and doubtless was, necessary to the proper security of the various holders of the defendant's policies and to the proper and successful transaction of its business. The plaintiff avers no facts which disclose that under the provisions of his policy he acquired any interest in that portion of the surplus which represented the accumulation of a part of the defendant's earnings for forty years and which remained after it paid the plaintiff the portion³⁸ which its officers had from time to time determined as equitably belonging to him. Before the plaintiff was entitled to recover, he was required to show that under his contract he had some legal title to or interest in the fund in the defendant's possession. His allegation is, that if that fund was divided as an amount in which he had an interest was previously divided, he would be entitled to receive the sum mentioned in the complaint. That allegation in no way shows that he had any interest in that fund, or that he was entitled to receive from the defendant the amount claimed or any other amount. The requirements of a valid complaint are that it shall contain a plain and concise statement of the facts which constitute a cause

of action. That requirement has not been fulfilled in this case. As we have already seen, the plaintiff has failed to state sufficient facts to disclose that he has any right or interest in the fund of which he seeks to recover a part.

The contract between the parties, the defendant's charter, and the statute of 1872 are all to the effect that the distribution of its surplus by the defendant was to be based upon principles of equity and controlled by the discretion of the defendant's officers. Under the policy, it was only the proportion of the surplus which equitably belonged to it that was to be credited to it and paid to the plaintiff. Therefore, before any amount of the surplus was available as a credit upon the plaintiff's policy, the proportion which equitably belonged to him, or should be credited to his policy, must be ascertained and determined. Until that was done no action at law to recover any portion of it could be maintained. Such an ascertainment and determination was a condition precedent to the right of recovery. It may be that if the defendant had failed or refused to ascertain and distribute the proportion of the surplus which equitably belonged to the plaintiff he could compel it to act and determine the amount. Still, until that was done no action at law for its recovery could be maintained.

These considerations render it manifest that, upon the facts alleged in his complaint, the plaintiff is not entitled to recover. ³⁰ Eliminating from it the conclusions, inferences, and construction of the pleader, and considering only the averments of fact, it fails to show any right in the plaintiff to maintain this action. No facts are alleged which show that the plaintiff, under his policy, had any actual interest in the fund of which he seeks to recover a part. By its terms he possessed no legal right to any part of the defendant's surplus, except in that portion which its officers determined to distribute among the holders of its policies, and an action at law could not be maintained until that determination was made.

It follows that the order and interlocutory judgment of the appellate division reversing the interlocutory judgment entered upon a decision of the special term should be reversed, that the interlocutory judgment of the special term should be affirmed, with costs to the appellant in all the courts, and that the question certified to this court should be answered in the negative.

All concur, except Vann, J., not voting.

PLEADING—ADMISSIONS.—A DEMURRER admits only such facts as are well pleaded. It does not admit conclusions of law stated by the pleader, or his opinions: Note to Southern Ry. Co. v. Covenia, 62 Am. St. Rep. 316. It does not admit conclusions of fact or of law: Note to McPhail v. People, 52 Am. St. Rep. 312.

SIMIS v. McELROY.

[160 NEW YORK, 156.]

VENDOR AND PURCHASER—TITLE BY ADVERSE POSSESSION—SALE—COMPELLING ACCEPTANCE—HAZARD OF LITIGATION AS TO TITLE.—A vendor of land, whose title is based entirely on adverse possession, cannot require a purchaser thereof, who is entitled under his contract to a deed vesting title in fee simple, to accept such title at the peril of liability in damages for a breach of his contract, simply by showing that he has had possession for the statutory period. He must also show that the defendant cannot hereafter be called upon to litigate the question of title with strangers to the action who may claim title under some former owner.

VENDOR AND PURCHASER—TITLE BY ADVERSE POSSESSION—SALE—COMPELLING ACCEPTANCE—NEGATIVE CLAIM BY HEIRS OF FORMER OWNER.—When an executory contract for the sale of real estate provides for a deed vesting in the purchaser a title in fee simple, and the vendor's title is based entirely on adverse possession, the vendee may resist a compulsory performance of the contract on his part, unless the vendor shows that the title tendered is good, or at least marketable, as against all the world, and to do this he must not only prove that he has had possession for the statutory period, but negative the possibility of an outstanding claim to the land by the heirs of a former owner, as to whom the adverse possession has been open to the contingencies of remaindership or infancy.

Action brought by Simis and another, as executors of Mary O. Simis, deceased, to recover damages for the defendant's breach of an executory contract for the sale of certain real estate. There was a verdict for the plaintiffs, but this was set aside by the appellate division of the supreme court and a new trial granted. The plaintiffs appealed.

J. H. K. Blauvelt, for the appellants.

Daniel Daly, for the respondent.

160 O'BRIEN, J. This action was brought by the plaintiffs' testatrix, who died during its pendency and about five years after it was commenced. The purpose of the action was to recover damages for the breach by the defendant of an executory contract for the sale of certain real estate in the city of New

York. It is an admitted fact in the case that both parties made tender of performance on the day specified for that purpose in the contract, and the defense to the action is that, at the time of the tender, the plaintiff's title was defective and unmarketable and has so remained ever since. Upon that ground the defendant refused to accept the deed tendered to him, though ready and willing to perform but for the defect in plaintiff's title.

At the close of the trial the plaintiff's counsel stated that he asked a verdict for nominal damages only, and the court directed a verdict for the plaintiff for six cents damages, and directed that the defendant's exceptions be heard in the first instance at the general term. On the hearing of the exceptions at the appellate division they were sustained, and the verdict was set aside and a new trial granted. The only question necessary to consider, therefore, is whether the plaintiff made out a case for damages at the trial, or, in other words, whether the facts were of such a conclusive character as to ¹⁶¹ entitle the plaintiff to even nominal damages as matter of law. If the title tendered by the plaintiff was so defective as to be unmarketable, then there was no breach of the contract established, and the plaintiff was not entitled to recover.

It is admitted that, as to a material part of the premises embraced in the contract, the plaintiff had no record title, but she claimed to have good title by adverse possession, and the question presented by this appeal is whether the plaintiff established title in that way so conclusively as to warrant the court in directing a verdict in her favor. It is important to bear in mind that the controversy is not between the party holding or claiming under the record title and the plaintiff claiming by adverse possession, but between the latter and a purchaser by executory contract to recover damages for his refusal to accept a title based entirely on such adverse possession. The holders of the outstanding record title, if any, are not parties to this action and cannot be bound by the judgment, and hence the defendant, if compelled to accept the deed tendered, might still be obliged to litigate with the true owners the question of title as against them. When the controversy assumes the form of an action of ejectment against the party in possession by one claiming under title by record, the former is in a stronger position to assert his right than when he is litigating with a stranger who refuses to accept his title. In the former case, adverse possession is evidence of title in the party

asserting it: *Baker v. Oakwood*, 123 N. Y. 16. It might well be held to have the same effect in every case but for the difficulty, if not impossibility, of establishing the fact as against those who are not parties to the action or bound by the judgment. In such cases, it is frequently very difficult for courts to anticipate what the owner of the outstanding title may be able to prove in a litigation with a party who has taken a title by adverse possession. The former may be able to prove facts tending to show that what appeared to be an adverse possession, in a litigation in which he was not heard, is quite otherwise, and hence this court has frequently refused to compel a purchaser to take a title which ¹⁶² he may be called upon to defend by parol proof of adverse possession: *Heller v. Cohen*, 154 N. Y. 299; *McPherson v. Schade*, 149 N. Y. 16; *Holly v. Hirsch*, 135 N. Y. 590; *Irving v. Campbell*, 121 N. Y. 353.

The plaintiff contracted to deliver to the defendant a deed "containing a general warranty, and the usual full covenants for the conveying and assuring to him the fee simple of the said premises free from all encumbrance." The deed tendered did not assure to the defendant the fee simple in the property, since the plaintiff was obliged to prove her title by adverse possession. It was made out in this action by parol proof, which is open to change hereafter in any litigation between the defendant and the parties who have succeeded to the record title. Adverse possession is defined by the code, sections 369, 373, and, unless the case made by the plaintiff met all the conditions prescribed by these sections, she has failed to establish a breach of the contract on the part of the defendant in refusing to accept the title tendered.

The court below, upon a review of the testimony, was of the opinion that she had not. It would require a very clear and a very peculiar case to warrant this court in interfering with the judgment in order to enable the plaintiff to retry a case involving only nominal damages: *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 34; *Pratt v. New York Cent. etc. R. R. Co.*, 77 Hun, 139. The plaintiff undoubtedly proved possession of the premises for over thirty years, and, if her right of recovery depended upon that fact alone, it was established. But possession, though a very important element in making out her title, was not the only thing to be considered. In order to prove such an adverse possession as would make her title good and require the defendant to accept it at the peril of liability in damages for the breach of his contract, she was

bound to show that the defendant could not hereafter be called upon to litigate that question with strangers to this action who might claim title under some former owner. She was bound to show that the title tendered was good, or at least marketable, as against all the world. The proof, we think, fell far ¹⁶³ short of this requirement, and so we think that the learned court below was right.

The defect in the proof has been very clearly and fully pointed out in the opinions given in the court below, and it is unnecessary to repeat the facts here. In 1856, the premises were conveyed to the plaintiff's remote grantor by a party who, so far as appears, had neither record title nor possession. Since that time, by reason of conveyances, the property was repeatedly transferred until it was deeded to the plaintiff in 1880. Her possession and that of her grantors since 1856 has been clearly shown, but just where the title was prior to that date does not appear. It is quite probable that the plaintiff's title is good, but whether the defendant can be compelled by the courts to accept it is a very different question.

It appears that one Kip, who died in the year 1777, was the owner of a considerable tract of land in the city of New York, which included the premises in question. He left a will which was proved in 1805, devising the land or some interest in it to his children. A share which had been devised to a daughter dying before her father was by a codicil devised to her daughter, the testator's grandchild, but for life if she died without issue, with remainder to the surviving children of the testator. It does not appear that the conveyance to the plaintiff's remote grantor in 1856 carried the title of all the Kip heirs; and hence the claim that the plaintiff has title by adverse possession. Adverse possession does not commence to run against heirs taking the title to land by descent, or by will, until the right of entry has accrued, or while they were under any disability. The remainderman's right of entry does not accrue until the termination of the estate or estates upon which the remainder is limited. Nonresidence, infancy, or other disabilities, sometimes operate to prevent the statute of limitations from running. The difficulty with the plaintiff's case is that she has not negatived the possibility of an outstanding claim to this land, or some interest in it, by the heirs of Kip. It may be true that it was impossible to do it, but in such cases the vendor may always describe the title ¹⁶⁴ which he has, or intends to convey, in the contract, and if the vendee agrees to take it he will be bound.

When the contract in terms provides for a deed to vest in the purchaser the title in fee simple, and the vendor's title is open to doubts, such as exist in this case, there will be room left for the vendee to resist compulsory performance on his part. This situation arises from the fact that it is impossible in such cases for courts to adjudge with that reasonable certainty which the nature of the case requires that his fears with respect to the title, whether real or assumed, are groundless.

In order to make the adverse possession since 1856 good against the heirs of Kip, the proof must be of such a character as to exclude to a moral certainty any right or claim on their part. In other words, it should have been proved that their interest passed to the plaintiff's remote grantor under the deed of that year. Unless it did, they may be able to prove facts which might qualify, if not wholly avoid, the fact of possession in the plaintiff and her predecessors. Whether they are infants, or under some other disability, or nonresidents or remaindermen, does not appear, so that the proof did not warrant the court in directing a verdict. It was thus ruled, as matter of law, that the plaintiff's title was good. The most favorable view that could be taken of the plaintiff's case would not warrant the court in taking the question from the jury, and hence the exception taken by the defendant's counsel to the refusal of the court to submit the question was good.

On the whole, we think that the case was well decided below, and that the order must be affirmed, with costs, and judgment absolute be given for the defendant.

All concur.

VENDOR AND PURCHASER—COMPELLING ACCEPTANCE OF TITLE—ADVERSE POSSESSION.—A purchaser of land cannot be compelled to take a defective title, unless he is shown to have stipulated to take such a title: *Note to Burks v. Davies*, 20 Am. St. Rep. 217; *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844. An agreement to make a good title is always implied in executory contracts for the sale of land, and a good title means not merely a title valid in fact, but a marketable title: *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844. A marketable title is one in which there is no doubt involved, either as to matter of law or fact. If there is color of outstanding title which may prove substantial, though there is not enough in evidence to enable the court to say so, a purchaser is not compelled to take it and encounter the hazard of litigation: *Note to Simon v. Vandever*, 63 Am. St. Rep. 688. But a title by adverse possession has been held to be a marketable title: *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432, and numerous cases cited therein. See, also, *Hodges v. Eddy*, 41 Vt. 485, 98 Am. Dec. 612; *Moore v. Luce*, 29 Pa. St. 260, 72 Am. Dec. 629.

STEPHENS v. MERIDEN BRITANNIA COMPANY.

[160 NEW YORK, 178.]

CHATTEL MORTGAGES—VALIDITY—WANT OF FILING—DELIVERY AND CHANGE OF POSSESSION.—A chattel mortgage which is neither filed as required by law, accompanied by an immediate delivery nor followed by an actual and continued change of possession of the property mortgaged, is not absolutely void. It is void as against subsequent judgment creditors of the mortgagor, but is good as between the parties thereto, and as against creditors at large.

RECEIVERS IN SUPPLEMENTAL PROCEEDINGS—ACTION FOR CONVERSION—TRANSFER IN FRAUD OF CREDITORS.—A receiver, in proceedings supplementary to execution, may file a bill in equity to set aside a transfer of the debtor's property, made before his appointment, if the transfer was in fraud of creditors, but he cannot maintain an action at law for the conversion of property so transferred, because it is not "the property of the judgment debtor."

RECEIVERS IN SUPPLEMENTAL PROCEEDINGS—REPRESENTING GENERAL CREDITORS—ACTION FOR CONVERSION.—Though a chattel mortgage, made by a debtor, is not filed as required by law, nor accompanied by an immediate delivery, nor followed by an actual and continued change of possession, of the property mortgaged, if such property is taken and sold by the mortgagee before the recovery of a judgment against the debtor, a receiver, subsequently appointed upon the basis of a judgment so recovered, cannot maintain an action against the mortgagee and the purchaser to recover damages for the conversion of the property, where the creditor represented by him was, at the time of the execution of the mortgage, and of the sale, a general creditor of the mortgagor, having no attachment or judgment.

STATUTES—CONSTRUCTION—RECEIVERS AND OTHER TRUSTEES.—The statute of New York declaring and extending the powers of executors, assignees, receivers, and other trustees, does not apply to receivers appointed in proceedings supplementary to execution.

APPEAL—CLAIM NOT AVAILABLE ON—CHANGE FROM LAW TO EQUITY.—If an action has been brought as an action at law, and it has been tried and determined as such, and the defendants have moved to dismiss because the plaintiff has mistaken his remedy, the plaintiff cannot, on appeal, avail himself of the claim that the evidence is sufficient to support a bill in equity.

Action brought by George W. Stephens, as receiver of the McCall Publishing Company, against the defendants, to recover damages. The court directed a verdict for the plaintiff, upon which judgment was entered, and this judgment was affirmed by the appellate division of the supreme court. The defendant company appealed.

George S. Daniels, for the appellant.

George W. Stephens, for the respondent.

179 VANN, J. On the 19th of November, 1892, a foreign corporation, know as the McCall Publishing Company, gave to the Meriden Britannia Company, another foreign corporation, a bill of sale of certain printing machinery and materials to it **180** belonging, for the purpose of securing the payment of nine hundred dollars, then owing by the former to the latter for rent past due and unpaid. This instrument, which in legal effect was a chattel mortgage, was not filed until December 7, 1892, owing to the request of the mortgagor and the promise of the managing agent of the mortgagee that he would withhold it from record "if it did not conflict with the security." The property remained in the possession of the mortgagor until the 9th of January, 1893, when the mortgagee took possession of it by virtue of the mortgage, and twelve days later sold it to the firm of Page & Ringot for the sum of nine hundred dollars, its fair value.

When the mortgage was given the McCall Publishing Company was owing one Walter Logan about seventeen hundred dollars, and on the 8th of February, 1893, he recovered judgment for the amount of his claim. Upon the basis of this judgment the plaintiff was appointed receiver of the property of the judgment debtor in proceedings supplementary to execution, instituted about the 20th of February, 1893, and on the 6th of May following he commenced this action against the Meriden Britannia Company and the persons composing the firm of Page & Ringot, to recover damages for the conversion of said property by them on the 9th of January preceding.

Upon the trial of the action, the foregoing facts, among others, appeared, and at the close of the evidence for the plaintiff, as well as at the close of the entire evidence, the defendant's counsel moved to dismiss the complaint, upon the ground "that an action for conversion will not lie under the proof adduced, and that the plaintiff has mistaken his remedy." This motion was denied, and the court directed a verdict in favor of the plaintiff for the sum of nine hundred dollars, with interest for three years, amounting in all to one thousand and sixty-two dollars, the defendants duly excepting. Upon appeal to the appellate division, that court reversed the judgment and granted a new trial as to the defendants Page & Ringot, but affirmed it as to the Meriden Britannia Company, which now comes here.

'2 The mortgage was neither filed as required by law, nor accompanied by an immediate delivery, followed by an actual

181 and continued change of possession of the property mortgaged, it was void as against judgment creditors of the mortgagor: Laws 1833, c. 279; *Stephens v. Perrine*, 143 N. Y. 476; *Sullivan v. Miller*, 106 N. Y. 635; *Jones v. Graham*, 77 N. Y. 628. It was not, however, absolutely void, for it was good as between the parties thereto and as against creditors at large. It was only void as to judgment creditors, or creditors armed with some legal process authorizing the seizure of property: *Button v. Rathbone*, 126 N. Y. 187. It was not void as *malum in se* but as *malum prohibitum*. It was valid as to all the world until attacked by a creditor standing upon an attachment or judgment. When the Meriden Britannia Company took possession of the property and sold it to Page & Ringot, the McCall Company could not have maintained trover or conversion, because it had transferred the property by an instrument which authorized the sale, and was conclusive so far as that company was concerned. Mr. Logan, the creditor now represented by the plaintiff, could not, at that time, have questioned the transfer in any way because he was not then a judgment creditor, and no attachment had been issued in his favor. Neither the giving of the chattel mortgage nor the taking of possession by virtue thereof and the transfer to third parties, conferred, at the date of such transfer, any right of action upon the McCall Publishing Company or upon Mr. Logan. Upon the recovery of judgment and the return of execution unsatisfied, Mr. Logan was still without power to maintain an action at law, but he could then have upheld a suit in equity to set aside the transfer, so far as it was an obstruction to the collection of his debt.

When the receiver was appointed, the property of the judgment debtor became vested in him. He was then in a position to bring any action relating to that property which the judgment debtor or the judgment creditor could have brought and none other. The judgment debtor, for instance, could have brought an action at law against anyone who had taken its property without its consent, while the judgment creditor could have brought an action in equity for taking the property 182 of the judgment debtor even with its consent, provided such taking was fraudulent as to creditors. The receiver, having the title of the judgment debtor, can maintain any action supported by that title which the judgment debtor could have brought. Representing the judgment creditor, he can also maintain any action in equity to set aside a fraudulent transfer which the judgment creditor could have brought. As he repre-

sents no one except the judgment debtor and the judgment creditor, he can bring no action except such as the one or the other could have brought: *Bostwick v. Menck*, 40 N. Y. 383; *Metcalf v. Del Valle*, 64 Hun, 245; 137 N. Y. 545. As was said by the court in *Bostwick v. Menck*, 40 N. Y. 383, "the appointment of the plaintiff as receiver of Beiser, made in the supplemental proceedings under the code, vested in him the legal title to all the personal property of Beiser: *Porter v. Williams*, 9 N. Y. 142, 59 Am. Rep. 519; *Becker v. Torrance*, 31 N. Y. 631. Such appointment conferred upon him the further right to prosecute such action to set aside all transfers of property made by Beiser to defraud his creditors as the creditors themselves could have maintained. . . . He acquires no right to the property by succession to the rights of the debtor, for the reason that the transfer is valid as against the debtor, and cannot be set aside by him as the debtor's successor; no rights other than those of the debtor are acquired. He does not acquire the legal title to such property by his appointment. That is confined to property then owned by the debtor, and the fraudulent transferee of property acquires a good title thereto as against the debtor, and all other persons except the creditors of the transferer; the only right of the receiver is, therefore, as trustee of the creditors. The latter have the right to set aside the transfer and to recover the property from the fraudulent holder, and the receiver is, by law, invested with all the rights of all the creditors represented by him in this respect. It is clear that the right of the receiver representing the creditors, and acting in their behalf, is no greater than that of the creditors. What, then, are the legal and equitable rights of a creditor as to property fraudulently ¹⁸³ transferred? Manifestly, only to treat as void and set aside such transfer, so far as shall be necessary to satisfy his debt and costs. He has no right to interfere with the transfer beyond this. When his debt and costs are paid, the transfer is as valid as to him as to other persons."

The receiver cannot bring an action at law for the taking of property formally transferred before the recovery of the judgment, because neither the judgment debtor nor the judgment creditor could have brought it. He can, however, by a bill in equity remove any obstacle, such as a fraudulent transfer, which, until set aside, would prevent him from taking possession of the property, and thereupon sell it and apply the proceeds upon the debt which he represents. If the property has been consumed, or for any reason cannot be identified or fol-

lowed, he can, in the same action, compel those legally responsible to account for it and pay over the value thereof to the extent necessary to satisfy the debt or debts represented by him, as well as the costs and expenses. He cannot, however, uphold an action at law for the conversion of property transferred, even in fraud of creditors, before he was appointed receiver, because that is not "the property of the judgment debtor" within the meaning of section 2468 of the Code of Civil Procedure, which is the source of his power: *Ward v. Petrie*, 157 N. Y. 301, 68 Am. St. Rep. 790; *Pettibone v. Drakeford*, 37 Hun, 628.

The title of the plaintiff is not strengthened nor is his power increased by the act of 1858 "to declare and extend the powers of executors, assignees, receivers, and other trustees": Laws 1858, c. 314; Laws 1894, c. 740. While the language of the statute is general in form, it obviously includes only such trustees as take the entire estate for the benefit of all the creditors, whereas a receiver in supplementary proceedings represents simply the creditor who brought about his appointment and such as caused the receivership to be extended to their claims, each of whom is entitled to payment in full in the order of diligence in instituting proceedings: Code Civ. Proc., secs. 2466, 2469. The object of the one statute is to secure distribution of all the effects of an insolvent, without ¹⁸⁴ any preference except such as is required by law, and of the other to simply collect the debt of a single creditor in full, and, if there is anything left, another creditor, by prompt action, may secure enough to pay his debt, and so on in the order in which proceedings are begun. The legislature, by classifying certain receivers with executors and others, who take the entire estate for the benefit of all creditors, indicated an intention to include only such receivers as take all, for the benefit of all, and not those who take all or a part, as the case may be, for the benefit of one only: *Bostwick v. Menck*, 40 N. Y. 383. The statute provides that "any executor, administrator, receiver, assignee, or trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership, or individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers, and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by or of the right belonging to any such trustee or estate." As was said in *Pettibone v. Drakeford*, 37 Hun, 628, "these words necessarily imply a receivership of the whole estate and not of a part."

This theory is confirmed and the method of attack is indicated by the next sentence of the act, which provides that "any creditor of a deceased insolvent debtor, having a claim or demand against the estate of such deceased debtor exceeding in amount the sum of one hundred dollars, may, in like manner, for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, disaffirm, treat as void, and resist all acts done, and conveyances, transfers, and agreements made, in fraud of the right of any creditor or creditors, by such deceased debtor, and for that purpose may maintain any necessary action to set aside such acts, conveyances, transfers, or agreements; and for the purpose of maintaining such action, it shall not be necessary for such creditor to have obtained a judgment upon his claim or demand, but such claim or demand, if disputed, may be proved and established upon the trial of such action."

¹⁸⁵ We think that the act of 1858, as amended in 1894, does not apply to receivers appointed in proceedings supplementary to execution.

The claim of the respondent, that the judgment should be affirmed because the evidence is sufficient to support a bill in equity, is not well founded. The complaint is in the form of a pure action at law to recover damages for the conversion of personal property with no allegation to suggest a court of equity as the forum resorted to, except those essential to show the appointment of the plaintiff as receiver, and hence that he had a legal capacity to sue. The plaintiff alleged that the defendants took possession of the property in question and "unlawfully converted and disposed of the same to their own use," and that the damages sustained thereby amounted to three thousand dollars. The only relief demanded is for the recovery of that sum and costs. There is not even a prayer for general relief. The trial was had without objection, in the usual way, before a jury; the verdict rendered was simply for a definite sum of money, and when the defendants moved to dismiss because the plaintiff had mistaken his remedy, as an action at law would not lie, no suggestion was made that the court should grant relief in equity, and no such relief was granted. The fact that the judgment-roll, execution, and return thereof were read in evidence without objection did not authorize the court to award equitable relief, as such evidence was not received for that purpose, but simply to show that the plaintiff was duly appointed receiver. No motion was made to amend the com-

plaint, and it stands as it was drawn, a pleading in a strict action at law.

The theory of the action as gathered from the complaint, the method of trial, and the practice followed throughout the history of the case have fastened it unchangeably on the law side of the court. It was brought there and tried there, and there it must remain, so far, at least, as this appeal is concerned.

We think that the judgment should be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., O'Brien, Haight, and Martin, JJ., concurred with Vann, J., for reversal.

BARTLETT, J., dissented, on the ground that the chattel mortgage given was, in the language of the statute, "absolutely void as against the creditors of the mortgagor"; that the receiver did not stand in the shoes of the judgment debtor, but was seeking to enforce a remedy conferred upon him by the statute; and that, as to instruments absolutely void as to creditors, the receiver could, as the creditor might, as between himself and the fraudulent mortgagee, treat the instrument as waste paper, and proceed as if the property sought to be conveyed by it had never left the possession of the mortgagor or grantor, except by the wrongful act of the mortgagee, and maintain an action for conversion, upon principle, irrespective of chapter 314 of the act of 1858. He considered that the question presented laid "within a very narrow compass." The plaintiff, he said, represented a judgment of about seventeen hundred dollars, and sought to apply thereon the sum of nine hundred dollars "in the custody of the fraudulent mortgagee," who took possession of the property under the provisions of the chattel mortgage and sold it, "and the bald question is, whether the receiver, as between himself and the mortgagee, can treat this mortgage as 'absolutely void,' as the statute declares it to be, and reach the proceeds of a conversion in an action at law which is insufficient to pay his judgment, or whether he is driven to the empty form of an action in equity to set aside an instrument which, as to him under these peculiar circumstances, is waste paper. In other words, is the mortgage to be held voidable only as to him, although the statute says it is 'absolutely void'?"

The counsel for the plaintiff sued for three thousand dollars, the alleged value of the property, but at the trial he limited the recovery to the amount of nine hundred dollars realized by the mortgagee at the sale, thus presenting the question, as between the judgment creditor and mortgagee, divested of the rights of third parties, and the learned judge was of the opinion that, as between the judgment creditor and mortgagee, the title to the mortgaged property never, in law, passed out of the McCall Company. "Under the peculiar facts of the case at bar," he said, "the statement that the mortgage was valid as between the parties and as to all the world, except creditors of the mortgagor, has no controlling force;

the plaintiff was entitled to all the proceeds of the conversion, and no third party had a valid claim. The judgment creditor represented by the plaintiff was, under the facts disclosed, entitled to act as if the mortgage never existed and treat the mortgagee as a naked trespasser in entering upon the premises of the McCall Company and converting its property. This was his statutory right, and not a cause of action that he derived from the judgment debtor. The action before us is one in which the judgment debtor never had part or lot, and the fact that the mortgage was valid as between the mortgagor and mortgagee is immaterial. In support of his views, his honor cited *Bostwick v. Menck*, 40 N. Y. 383; *Stephens v. Perrine*, 143 N. Y. 476; *Mandeville v. Avery*, 124 N. Y. 376, 21 Am. St. Rep. 678; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519. He quoted from and commented upon these cases, and also referred to the case of *Ward v. Petrie*, 157 N. Y. 301, 68 Am. St. Rep. 790, but was of the opinion that neither that case, nor any other, in the court of appeals, which had been brought to his attention, was authority for the proposition that the action could not be maintained. He therefore voted for an affirmance of the judgment, and Gray, J., concurred with him.

CHATTEL MORTGAGES — REGISTRATION — DELIVERY.—

Chattel mortgages, to be valid against creditors and subsequent purchasers and encumbrancers, without notice, must be recorded, when the mortgagor retains possession of the property: *Note to Brown v. James H. Campbell Co.*, 21 Am. St. Rep. 282. They must be recorded or the property must be delivered to, and retained by, the mortgagee: *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460, and note. As against the mortgagor, a chattel mortgage is good without being recorded: *Fuller v. Paige*, 26 Ill. 358, 79 Am. Dec. 379.

A RECEIVER APPOINTED IN SUPPLEMENTAL PROCEEDINGS does not, by virtue of his appointment and qualification, acquire the legal title to property previously transferred by the judgment debtor in fraud of his creditors, though he may maintain a suit to set aside such a transfer. Until then he has an equitable right, but no title. He is not entitled to "receive" anything that does not belong to the judgment debtor, and cannot, therefore, "receive" property disposed of by the latter before the receiver's appointment: *Ward v. Petrie*, 157 N. Y. 301, 68 Am. St. Rep. 790, and note.

SATTLE v. HALLOCK.

[160 NEW YORK, 291.]

CONTRACTS — CONSTRUCTION—DUTY OF COURT.—In the construction of contracts where there is no ambiguity, it is the duty of the court to determine their meaning, and where the terms and language of a contract are not disputed, its legal effect is a question of law to be determined by the court.

CONTRACTS — CONSTRUCTION—INTENTION OF PARTIES.—It is always the duty of a court, in construing a written contract, to ascertain, if possible, the intention of the parties; and, in order to determine its proper construction, resort must be had to the contract as a whole, and effect must be given to every clause and part thereof, when it can be done without violence.

BAILMENT—WHAT CONSTITUTES—FURNISHING AND IMPROVEMENT OF PROPERTY.—When property in an unmanufactured state is delivered by one person to another, upon an agreement that it shall be manufactured or improved by his labor and skill, and, when thus improved, shall be divided between the respective parties in certain proportions, or sold and the proceeds divided, the transaction is a bailment, the original owner retaining his exclusive title to the property until the contract is fully executed, although the value of the labor to be performed by the bailee may equal or exceed the value of the property at the time he received it.

BAILMENT OR SALE—MANUFACTURING FARM PRODUCE INTO PICKLES.—When a number of farmers, who own a pickle factory, deliver to one who represents them jointly with a business firm certain farm products, upon an agreement that the firm shall manufacture such products into pickles, and furnish the labor, utensils, and additional materials; that such products shall be sold as the products of a farmers' company subsequently to be organized; and that the net proceeds shall be divided in specified proportions between the farmers and the firm, the transaction imports a bailment and not a sale, particularly where the parties to the contract understand it to be one of bailment.

CONTRACTS — CONSTRUCTION — AMBIGUITY — INTERPRETATION BY PARTIES.—The construction of a contract is as much a part of it as anything else, and its interpretation by the parties is a consideration of importance. If a contract is indefinite or ambiguous, resort may be had to the surrounding facts and circumstances as they existed when it was made, to aid in its interpretation, and the practical construction given to it by the parties may also be considered.

BAILMENT—ACTION BY BAILEE FOR CONVERSION—WHEN NOT MAINTAINABLE.—Under a contract of bailment, where farmers, who own a pickle factory, furnish farm produce at their factory to be manufactured there into pickles by a business firm, the net profits to be divided, the farmers retain title to their produce until the contract is completely executed. Hence, if the firm makes a general assignment for the benefit of creditors before it fully executes the contract, the farmers are entitled to the produce and its products, manufactured or unmanufactured, in the factory at the time of the assignment, and the bailee has no such title thereto as will enable him or his assignee to maintain an action against the farmers for a conversion of the property, where they have possession thereof and refuse to deliver it.

Action to recover the value of certain personal property alleged to have been wrongfully converted, brought by the plaintiff, Sattler, as assignee for the benefit of creditors of the firm of John A. Meierdiercks & Sons. There was a judgment for the defendant and an order denying the plaintiff's motion for a new trial. The judgment and order were affirmed by the appellate division of the supreme court and the plaintiff appealed.

John E. Brodsky, for the appellant.

Ackerly & Miles, for the respondents.

294 MARTIN, J. On the twenty-first day of February, 1895, twenty-five farmers, residents of the town of Smithville, Long Island, were the owners of a building or premises used as a pickle factory, situated in that town. On that day they entered into a written agreement with the firm of John A. Meierdiercks & Sons, in relation to the production, manufacture, and sale of pickles, sauer kraut, and other like products.

So far as material to the question involved, the contract was substantially as follows: The parties agreed to organize a responsible company or corporation for the purpose of conducting or aiding in the production and manufacture of the articles referred to in the contract. It then provided that the farmers were to prepare and deliver to the plaintiff's assignors at the factory, pickles, cabbage, dill, etc., to be raised upon an acreage which was given, and at prices stated therein. If the building proved insufficient, the farmers were to provide an additional one at a cost not to exceed three hundred dollars, to be paid by the assignors and deducted from the net profits at the end of the season, they guaranteeing that such profits **295** should amount to at least that sum. If they were more than the cost of the building, then the farmers were to receive twenty per cent thereof, to be divided between them according to the amount of produce furnished by each. The assignors were to take the pickles, cabbage, and other produce, pay the prices named at the times and in the manner stated, furnish the labor, machinery, barrels, tanks, salt, spices, and other necessary material, and pay the freight and cartage. These expenses were to be deducted from the gross receipts of the sales of the pickles, sauer kraut, and other goods so manufactured. A list was then given of the number of acres of each kind of produce which was to be furnished by each of the twenty-five farmers named. To receive products at the factory, the assignors were to furnish one

man and the farmers another, who were to attend to their reception and decide all matters of dispute in relation to them. The representative of the farmers was to be given full and complete data of all the produce delivered and all barrels, salt, spices, and utensils furnished and all the goods of every description received and shipped by the assignors, so as to show the gross receipts and expenses for the year. The agreement then provides: "The manufacture and sale of all the products of the Long Island Farmers' Company shall be done by J. A. Meierdiercks & Sons. . . . It is hereby agreed by the undersigned of the Long Island Farmers' Company that at any time should the business of the Long Island Farmers' Company cease and the property, including buildings, utensils, barrels, etc., be sold or bartered, the members of the Long Island Farmers' Company other than J. A. Meierdiercks & Sons, guarantee to J. A. Meierdiercks & Sons thirty-five per cent of the amount realized." This agreement was signed by the twenty-five farmers mentioned and by the plaintiff's assignors.

Subsequently, the Long Island Farmers' Company was organized in accordance with the contract. By-laws were passed, and the defendants were elected as its managing officers. Soon after the execution of the contract, the plaintiff's assignors went to the factory, proceeded to manufacture ²⁹⁶ the produce which was delivered under it, and continued that business until they made a general assignment to the plaintiff. The keys of the factory were retained by and continued in the possession of a representative of the farmer, who, after the produce was delivered at the factory and manufactured, shipped it to various purchasers. During the continuance of this business, the executive officers of the Farmers' Company, or some of them, were usually present at the factory and engaged in looking after the business there transacted. They gave directions, passed judgment upon the quality of the produce, and were often consulted by the assignors' representative in regard to affairs connected with the business. Although the manufactured products were sold by the plaintiff's assignors, they were billed "J. A. Meierdiercks & Sons, Agents Long Island Farmers' Company." These bills were sent, and checks, drawn to the order of the company, were received, when the assignors requested the committee of the company to give them a power of attorney to indorse them, which it refused to do.

On the 17th of September, 1896, the firm of John A. Meierdiercks & Sons made a general assignment to the plaintiff for the

benefit of its creditors. Subsequently, the plaintiff went to the factory at Smithtown and demanded all the products manufactured and unmanufactured, claiming that they were owned by the assignors at the time of the assignment and were a part of the assets of that firm. With this demand the managers of the company refused to comply, claiming that by the terms of the agreement the company and the farmers it represented were the lawful owners of such products. This action was to recover their value at the factory at the time of the assignment upon the ground that the defendants had wrongfully converted them to their own use. The defendants alleged title in the Long Island Farmers' Company, and that they, as its representatives, were entitled to the possession of the property.

Thus it is obvious that the single question involved is whether, under the contract between the parties, the title to ²⁹⁷ the property in suit vested in the plaintiff's assignors and was transferred to him by the assignment, or whether it remained in the Farmers' Company or the farmers furnishing it.

On the trial, the court held that the contract imported a sale, but submitted to the jury the question whether, under the facts and circumstances proved, including the acts of the parties, the contract had been substantially altered, so that the title rested in the defendants or the company or persons they represented. The jury found for the defendants. The appellate division, however, held that the evidence was not sufficient to justify the submission of that question to the jury, but that the contract between the parties was one of bailment, or partnership, and not of sale, and, hence, the plaintiff was not entitled to recover, and judgment for the defendants was properly rendered.

With this situation it is obvious that the determination of the courts below can be sustained only in case the transaction between the parties was a bailment or joint enterprise. If it was a bailment, manifestly the defendants were entitled to retain the possession of the property. If it was a joint enterprise, the plaintiff could not recover in an action for the conversion of the property, as the defendants were entitled to its possession, as against the plaintiff, until the matters arising under the contract were adjusted. We fully agree with the learned appellate division that there was no evidence to justify the trial court in submitting to the jury the question of an alteration or modification of the original agreement. Therefore, the real question we are called upon to decide is whether

the agreement of the parties imported a sale of the property to the plaintiff's assignors. If it did, and the title passed, then the plaintiff is entitled to recover. If not, then the judgment is right and should be affirmed.

In the construction of contracts, where there is no ambiguity, it is the duty of the court to determine their meaning. Moreover, where the terms and language of the contract are not disputed, its legal effect is a question of law to be determined by the court. It is always the duty of a court, in construing ²⁰⁸ a written instrument, if possible, to ascertain the intention of the parties; and in order to determine its proper construction resort must be had to the instrument as a whole, and effect must be given to every clause and part thereof when it can be done without violence: *Ripley v. Larmouth*, 56 Barb. 21.

With these principles in mind, we approach the question whether, under the provisions of this contract, the plaintiff's assignors were bailees of the property, or whether the contract was one of purchase and sale.

One of the distinctions between a bailment and a sale is correctly pointed out in the dissenting opinion of Bronson, C. J., in *Mallory v. Willis*, 4 N. Y. 76, 85, as follows: "When the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed": *Foster v. Pettibone*, 7 N. Y. 435, 57 Am. Dec. 530.

There are, however, other principles applicable to the question. Thus, when property in an unmanufactured state is delivered by one person to another, upon an agreement that it should be manufactured or improved by his labor and skill, and, when thus improved in value, should be divided in certain proportions between the respective parties, it constitutes a bailment, and the original owner retains his exclusive title to the property until the contract is completely executed, although the labor to be performed by the bailee may be equal or even greater in value than that of the property when received by him: *Beardsley, J.*, in *Gregory v. Stryker*, 2 Denio, 631.

Again, the relation is that of bailor and bailee, where the property is thus delivered to be manufactured or improved, and afterward there is to be a sale and a return or a division of the proceeds: *Stewart v. Stone*, 127 N. Y. 500.

In *Hyde v. Cookson*, 21 Barb. 92, there was a written agreement between the plaintiffs and one Osborn in relation to tanning a quantity of hides. The hides were to be furnished by

the plaintiffs on a commission of five per cent for buying and six per cent for selling the leather. Osborn was to take the hides to his tannery, manufacture them into hemlock ²⁹⁹ sole leather and return it to the plaintiffs, who were to sell it in their discretion. When sold, the account was to be made up, and the net proceeds of the sales, after deducting the cost of hides, commissions, interest, insurance, and other expenses, were to be the profit or loss to accrue to Osborn in full for tanning the hides, and it was held that this was not a contract of sale, but of bailment, and that the title remained in the plaintiffs.

In *Pierce v. Schenck*, 3 Hill, 28, logs were delivered at a saw-mill under a contract with the person running the mill that he would saw them into boards and that each party should have one-half. It was held that the transaction was a bailment; that the bailor retained his general property in the logs until they were all manufactured in pursuance of the contract, and that, as between the parties, the bailee acquired no interest in any of the boards manufactured by mere part performance within the time.

In *Mallory v. Willis*, 4 N. Y. 76, the plaintiffs agreed to deliver merchantable wheat at a flour-mill carried on by the defendant to be manufactured into flour. The defendant agreed to deliver one hundred and ninety-six pounds of superfine flour, packed in barrels to be furnished by the plaintiffs, for every four bushels and fifteen pounds of wheat. He was to be paid sixteen cents per barrel, and two cents extra in case the plaintiffs made one shilling net profit on each barrel of flour. The defendant was to guarantee the inspection. The plaintiffs were to have the offals or feed which the defendant was to store until sold. This court held in that case that the contract imported a bailment and not a sale. The doctrine of that case was indorsed in *Foster v. Pettibone*, 7 N. Y. 433, 57 Am. Dec. 530.

In *Mack v. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, the parties entered into a contract by which the plaintiff agreed to manufacture for the defendant one thousand pairs of pruning shears, to be in all respects like a sample furnished, the defendant to furnish the rough castings for the handles and the plaintiff to furnish the blades. It was held that the contract was one of bailment and not of purchase and sale, so that the title to the shears manufactured was at all times in the defendant.

³⁰⁰ Applying these principles to the contract under consideration, we think it is quite obvious that it was one of bailment and not of purchase and sale. Under its terms the parties

represented by the defendants were to furnish certain specified amounts of farm produce which was to be delivered at a factory owned by them and manufactured into pickles, sauer kraut, and other similar articles. It was to be received jointly by a representative of the plaintiff's assignors and a representative of the farmers. The plaintiff's assignors were to pay the prices named for the produce furnished, to furnish the labor, machinery, and materials, such as salt, spices, barrels, and other necessary articles and utensils, and to pay the freight and cartage. The amount thus expended was to be deducted from the gross receipts of the sales of the articles manufactured, and the representative of the farmers was to be furnished with a full account of all of the transactions connected with the business. The manufacture and sale of the products of the Long Island Farmers' Company were to be done and made by the plaintiff's assignors, and the net proceeds were to be divided by paying twenty per cent to the farmers, or for their benefit, and the assignors to have eighty per cent. Thus the produce was to be furnished by the persons represented by the defendants, was to be manufactured by the plaintiff's assignors, to be sold as the products of the Long Island Farmers' Company, and the net profits divided. The raw material, which was owned by parties the defendants represent, was delivered to the plaintiff's assignors to be improved by their labor and skill. It was then to be sold and the net value divided in the proportions named. So that, clearly within the principle of the Gregory and other kindred cases, the owners of the produce thus delivered retained their title to the property until the contract had been completely executed, and this without regard to the value of the labor performed upon it by the plaintiff's assignors as such bailees. We think when this entire contract is examined and understood it clearly imports a bailment and not a sale.

It is also quite manifest that the parties understood such to **301** be the nature of the agreement between them. This is shown by the facts that the property, after it was manufactured, was shipped from the factory to the company; that the plaintiff's assignors, acting under this contract, in selling the manufactured produce, caused the bills to be sent to purchasers in the name of the company with their names thereon as agents; that checks were taken therefor drawn to the order of the company in accordance with the bills sent; that the assignors asked for a power of attorney authorizing them to indorse the same; that the representatives of the farmers were present at the factory,

and that they gave directions as to the management of the business there carried on. All these facts tend to show with convincing certainty that the plaintiff's assignors, as well as the other parties to the contract, understood it to be one of bailment, where the property was to be furnished by the latter, improved by the former, and the net profits divided.

If this contract is to be regarded as somewhat indefinite or ambiguous, we may resort to the surrounding facts and circumstances as they existed when it was made to aid us in its interpretation and also consider the practical construction which the parties have given it. Its interpretation by them is a consideration of importance. As was said by Swayne, J., in *Insurance Co. v. Dutcher*, 95 U. S. 269, 273: "The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done": *Woolsey v. Funke*, 121 N. Y. 87.

It follows from the conclusion we have reached as to the character of the contract and the relation existing between the parties that the judgment must be affirmed, as the agreement between them constituted a bailment of the property in question, and the plaintiff's assignors acquired no such title as would enable them to maintain an action for its conversion.

The judgment should be affirmed, with costs.

All concur.

CONTRACTS—CONSTRUCTION, GENERALLY.—Ordinarily, a written contract must be construed by the court: *Leaphart v. Commercial Bank*, 45 S. C. 563, 55 Am. St. Rep. 800; note to *Wisconsin Marine etc. Bank v. Wilkin*, 60 Am. St. Rep. 93; and effect must be given, if possible, to every expression in it, for the intention of the parties is to be collected from the whole instrument, and must be carried into effect, if possible: Note to *Wisconsin Marine etc. Bank v. Wilkin*, 60 Am. St. Rep. 93. Whether or not a writing, upon its face, is a complete expression of the agreement of the parties is one of law: *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469.

CONTRACTS—CONSTRUCTION—ACTS OF PARTIES.—When the language used by parties to a contract is indefinite and ambiguous, the practical interpretation by the parties themselves, as shown by their acts, is the best guide for its interpretation: *Wyatt v. Larimer etc. Irr. Co.*, 18 Colo. 298, 36 Am. St. Rep. 280, and note. The best evidence of how parties to an agreement understood its terms is afforded by their acts under it, and these may be shown to aid the court in arriving at a proper interpretation: *Pratt v. Prouty*, 104 Iowa, 419, 65 Am. St. Rep. 472.

BAILMENT OR SALE.—The fundamental distinction between a bailment and a sale is, that in the former the subject of the contract, although in an altered form, is to be restored to the owner, whilst in the latter there is no obligation to return the specific

article, either in the same or an altered form. In the one case the title is not changed, in the other it is, the parties standing in the relation of debtor and creditor: *Bretz v. Diehl*, 117 Pa. St. 589, 2 Am. St. Rep. 706. Compare the extended note to this case on the distinction between a sale and bailment, and see, also, *Chickering v. Bastress*, 130 Ill. 208, 17 Am. St. Rep. 309.

GANNON v. McGUIRE.

[160 NEW YORK, 476.]

APPEAL—WHEN THE QUESTION AS TO WHETHER A FACT IS SUPPORTED BY EVIDENCE IS ONE OF LAW.—If the appellate court, under the New York practice, reverses the judgment of the trial court, without disturbing the facts presumed to have been found by that court, which include all facts warranted by the evidence and necessary to support the judgment, the question whether a fact found has the support of any evidence, which, according to any reasonable view, warranted the trial judge in finding it, is a question of law for review in the court of appeals.

GIFTS INTER VIVOS—WORDS—PARTING WITH POSSESSION.—Mere words of gift are not enough to create a gift inter vivos, for the owner must part with possession and control before the gift can take effect.

GIFTS INTER VIVOS—DELIVERY—WHAT IS SUFFICIENT.—The essential element of a gift inter vivos is delivery, by the donor, of the subject of the gift with intent to at once vest title thereto in the donee, but the delivery may be in accordance with the nature of the thing given, provided the circumstances show that the donor intended to divest himself of title and possession.

GIFTS INTER VIVOS—RETENTION OF POSSESSION—REDELIVERY FOR SAFEKEEPING.—After a gift inter vivos has been made complete by delivery, it is not necessary for the donee to retain possession of the property to make the gift effectual, but it may, without invalidating the gift, be redelivered to the donor, as the agent of the donee, for safekeeping.

GIFTS INTER VIVOS—MORTGAGE—POSSESSION—REDELIVERY FOR SAFEKEEPING.—A finding of a complete gift inter vivos is justified by evidence that the owner of premises, after conveying them, and taking from the grantee a mortgage, with accompanying bond, delivered the bond and mortgage to the grantee with intent to part with the title and possession and to transfer both to the grantee; that the mortgagor accepted the instruments so returned to him; and that he then handed the papers back to the mortgagee for safekeeping.

Action brought by Sarah Gannon, as administratrix of John Gannon, deceased, against Catharine McGuire and her husband. The purpose of the action was to foreclose a purchase money mortgage executed by Catharine McGuire to John Gannon. The judgment of the trial court was that the complaint be dismissed. The appellate division of the supreme court reversed

this judgment and granted a new trial. The defendants appealed.

Abram Kling, for the appellants.

Alexander Thain, for the respondent.

479 PER CURIAM. The substantial issue presented by the pleadings is whether the mortgage sought to be foreclosed in this action, together with the accompanying bond, were delivered by the plaintiff's intestate to the defendant Catharine McGuire as a gift *inter vivos*. According to the order of reversal, the learned appellate division did not disturb the facts presumed to have been found by the trial court, which include all facts warranted by the evidence and necessary to support the judgment: *People v. Adirondack Ry. Co.*, 160 N. Y. 225; Code Civ. Proc., secs. 1022-1338. The trial court decided that, prior to the death of plaintiff's intestate, "the defendant Catharine McGuire became the owner of the bond and mortgage described in the complaint . . . by virtue of an executed gift from plaintiff's" intestate. If this fact stands, the judgment of the trial court should stand, unless some error was committed during the progress of the trial to the injury of the plaintiff. Whether the fact has the support of any evidence, which, according to any reasonable view, warranted the trial judge in finding it, is a question of law, and is the main question presented for review: *Otten v. Manhattan Ry. Co.*, 150 N. Y. 395, 400; *Fairchild v. Edson*, 154 N. Y. 199, 217, 61 Am. St. Rep. 609. No question relating to the weight of evidence is before us, for if the appellate division intended to base their reversal upon a question of fact, the statute required them to make it clearly appear "in the record body of the judgment or order": Code Civ. Proc., sec. 1338.

Mrs. McGuire was a cousin of Mr. Gannon, the plaintiffs' intestate, and seems to have been his most favored relative. By his will, which for some reason was not admitted to probate, he gave her the greater part of his estate. According **480** to all the witnesses who spoke upon the subject, it was his clear intention to make a gift to her of the bond and mortgage in suit, but the testimony of some of them tended to show an intent to make a gift in futuro and not in praesenti. He signed and acknowledged a conveyance from himself to Mrs. McGuire, embracing the property covered by the mortgage, and, by the advice of his attorney, caused to be prepared

a mortgage from Mrs. McGuire to himself for eight thousand five hundred dollars, upon the same property, collateral to a bond in the penalty of seventeen thousand dollars. He then took all these instruments to the residence of Mrs. McGuire, and, according to the testimony of the notary who accompanied him, said to her: "I am giving you this house in Forty-eighth street. My lawyer, Mr. Cushing, has advised me to take back a bond and mortgage. I protested against it because I did not want the bond and mortgage. The house is to be yours, subject to the Emigrants' Savings Bank mortgage. I am doing this just as a matter of form." He then handed her the deed and said: "This is the deed of the property." Thereupon she executed the bond and mortgage and handed them to him. After she had thus executed the bond and mortgage and delivered them to him, he redelivered them to her. She then handed them to him and he said, "I am taking this to keep for you and put it in a place of safekeeping, so when I die you shall have this property free and clear of any encumbrance. I am simply doing this at the request of my lawyer, and it will be of no account because I am keeping it for you, and I will place it in a place of safekeeping for you, to be delivered to you upon my death, upon an order which I will sign to a party to deliver it to you." This testimony was corroborated to some extent by that of another witness. Two or three days later he said to the notary: "Mr. Ledwith is a particular friend of mine, of the Emigrants' Savings Bank. I meet him occasionally. I will put all the papers with him, to be delivered to Mrs. McGuire upon my death." He said he would hold them for her, would surrender them to her upon the order, and that he did not want the mortgage recorded as being a lien upon ⁴⁸¹ the property. Referring to the bond and mortgage he said, "You can burn it up."

Shortly afterward he left the papers with Mr. Ledwith, where they remained for about ten months, when he died. A few hours before his death, and in view of that event, he sent for his attorney, Mr. Cushing, and asked him to draw up an order for Mrs. McGuire upon Mr. Ledwith "to get what papers he left with him some time ago, as he did not know the date." Mr. Cushing thereupon drew an order upon Mr. Ledwith requesting him to deliver to the bearer, Catharine McGuire, "the deed, will, and all other papers left by me in your care and custody some time ago. I don't recollect the date. I am unable to call for these papers myself at present, and, therefore, I want you to deliver them to the said Catharine McGuire.

The deed belongs to her." After this order was read over to him he pronounced it correct, signed and acknowledged it, and personally handed it to Mrs. McGuire, saying that it was for her and that she could go to the Emigrants' Savings Bank and get the deed, bond, and the papers that he left with Mr. Ledwith. Mrs. McGuire went to the bank, presented the order, and received the bond and mortgage with the other papers. She sent the deed to the clerk's office to be recorded, and by mistake the mortgage was sent at the same time and was also recorded.

The essential element of a gift *inter vivos* is delivery by the donor of the subject of the gift with intent to at once vest title thereto in the donee. Mere words of gift are not enough, for the owner must part with possession and control before the gift can take effect. There must be an intent to make the gift in *praesenti*, because a gift to take effect in *futuro* is void as a promise without consideration. The delivery may be in accordance with the nature of the thing given, provided the circumstances show that the donor intended to divest himself of title and possession, but, "after the gift is made complete by delivery, it is not necessary that the donee shall retain possession of the property," for it may ⁴⁸² be redelivered to the donor, as the agent of the donee, for safekeeping. The mere custody of the property, after a complete gift in *praesenti* has been made, is subject to explanation, and its chief importance is its bearing upon the question whether there was an executed gift. The law as thus announced is settled by the following among many authorities which might be cited: *Westerlo v. De Witt*, 36 N. Y. 340, 93 Am. Dec. 517; *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181; *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634; *Beaver v. Beaver*, 117 N. Y. 421, 428, 15 Am. St. Rep. 531; *Farleigh v. Cadman*, 159 N. Y. 169, 173; 8 Am. & Eng. Ency. of Law, 1313; 2 Schouler on Personal Property, sec. 66 et seq.; 1 Parsons on Contracts, 7th ed., 234. As was said in *Beaver v. Beaver*, 117 N. Y. 428, 15 Am. St. Rep. 531, "in case of bonds, notes, or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention."

Applying the law to the facts as found by the trial judge upon sufficient evidence according to the rules governing appeals to this court, and we have a completed gift. After the execution and delivery of the bond and mortgage by Mrs. McGuire to Mr. Gannon he had complete title to those instruments, and it was in his power to keep his promise to make

her a gift of them or not as he saw fit. The bond and mortgage were his to do with as he chose. He thereupon delivered them to her with the intent, as it must be presumed from the findings, to part with title and possession and transfer both to her. Upon acceptance by her, the bond and mortgage became her property and she could do with them what she chose. It was in her power to retain them in her own possession, or to intrust them for safekeeping to anyone whom she might select. Whether the debt they represented was extinguished by their merger in the deed is now unimportant, and the mere fact that, upon his suggestion, she handed the papers to him for safekeeping only did not cut down the gift nor change it in any respect. Thereafter, he held the papers simply as custodian for her benefit. He had no control over them except as her agent, for by his executed gift he had put it out of his power to repossess himself of them as owner. The gift had ⁴⁸³ become irrevocable, the title had passed and the second delivery to him was as a depositary merely.

Whether the delivery of the order under all the circumstances could be sustained as a gift *causa mortis* it is not necessary to decide, for, as we think, according to the facts found by the trial court and left undisturbed by the appellate division, a complete gift *inter vivos* was made.

After examining all the exceptions in the record before us we find none that justifies the reversal by the appellate division of the judgment rendered by the trial court. The order appealed from should, therefore, be reversed and the judgment of the special term affirmed, with costs.

All concur.

GIFTS INTER VIVOS—DELIVERY—NECESSITY OF.—Words alone are not sufficient to constitute a gift *inter vivos*. A delivery of the property, with intent to give, is absolutely necessary to the validity of such a gift: *Wagoner's Estate*, 174 Pa. St. 558, 52 Am. St. Rep. 828, and note. It must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee: *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382, and note. If the thing is incapable of actual delivery, there must be some act equivalent to it: *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398.

LEVY v. DUNN.

[160 NEW YORK, 504.]

SHERIFFS—ACTION AGAINST—STATUTE DIRECTING SUBSTITUTION OF INDEMNITOR—CONSTITUTIONALITY OF. A statute which requires the court, upon the application of the sheriff, to substitute the applicant's indemnitor as defendant in the action, when the sheriff is sued for the recovery of chattels levied upon, or for damages by reason of a levy upon personal property, is mandatory, and violative of the constitutional prohibition against the taking of private property without due process, to the extent that it requires such substitution in opposition to the plaintiff's wishes.

Action brought by Levy against Dunn, as sheriff, to recover for the latter's conversion of personal property belonging to the plaintiff, and for consequential damages. The motion of the defendant, to substitute his indemnitor, the National Surety Company, as defendant in the action was granted. The appellate division of the supreme court reversed the order granting this motion, and the sheriff appealed.

Philip J. Britt, for the appellant.

Malcolm R. Lawrence, for the respondent, Levy.

William B. Hornblower and M'Cready Sykes, for the National Surety Company, respondent.

507 HAIGHT, J. The order appealed from is brought up for review upon a certificate of the appellate division to the effect that a question of law has arisen which should be reviewed by this court, and the following is the question certified: **508** "Has the court the power, under any circumstances, to deny a motion made, under section 1421 of the Code of Civil Procedure, to substitute indemnitors when the application is made by the sheriff?"

The facts under which the question has arisen are substantially as follows: Two executions were delivered to the sheriff of the county of New York in favor of one Keiser, one for the sum of \$3,677.72, issued against the property of Jennie Levy, and the other for the sum of \$3,341.62, issued against the property of Moses Levy. On the same day the National Surety Company gave to the sheriff two bonds, one in the penal sum of \$9,500, and the other in the penal sum of \$8,500, each conditioned, in substance, that if the National Surety Company should well and truly save and bear harmless and indemnify the sheriff, and all and every person or persons

aiding and assisting him or them from damage, liability, and costs by reason of the levying of such executions upon any personal property which the sheriff should judge to belong to the judgment debtor, then the obligation to be void, else to remain in full force and virtue. After receiving the bonds of indemnity, the sheriff proceeded to levy the executions upon a stock of ready-made clothing and removed the same to a warehouse, where the goods were subsequently sold. The plaintiff in this action claims that the goods so levied upon belonged to him, and that they were of the value of \$42,500; that only a portion of the goods taken from his store by the sheriff was taken to the warehouse and subsequently sold; that the greater portion was stolen or never accounted for, and that he has suffered special damages by reason of the interruption and breaking up of his business to the amount of \$100,000. After the commencement of this action the defendant moved the court for an order substituting as defendant in his place and stead the National Surety Company, the indemnitor. The motion was opposed by both the plaintiff and the National Surety Company. The special term granted the order prayed for, being of the opinion that the court had no discretion to deny the motion, for the reason that the provisions ⁵⁰⁹ of section 1421 of the Code of Civil Procedure were mandatory. The appellate division having reversed this order, the question certified is now presented for our determination.

Section 1421 of the Code of Civil Procedure provides as follows: "Where an action to recover a chattel or chattels hereafter levied upon by virtue of an execution, or several executions, or a warrant of attachment, or several warrants of attachment, or to recover damages by reason of a levy or levies upon detention, sale, or sales of personal property hereafter made, by virtue of an execution or several executions, or a warrant of attachment or several warrants of attachment, is brought against an officer or against a person who acted by his command or in his aid, if a bond or bonds or written undertaking or undertakings indemnifying the officer against the levy or levies, or other act or acts, has been given in behalf of the judgment creditor or the several judgment creditors, or the plaintiff in the warrant or the plaintiffs in the several warrants, either before or after the commencement of the action, the persons or person or the several persons who gave it to them, or the survivors, if one or more are dead, may apply to the court for an order to substitute the applicant or several

applicants as defendants in the action in place of the officer or of the person so acting by his command or in his aid; and the court shall, upon application of the officer, or, in case of his death, upon the application of his legal representatives, grant an order substituting the indemnitors as defendants in the action in place of the officer or of the persons so acting by his command or in his aid."

The application in this case was made under the concluding provision of the section, and we think we must agree with the special term that the provision is mandatory and leaves no discretion with the court. It provides that the court shall grant an order substituting the indemnitor as defendants in the action upon the application of the officer who has been made a defendant in the action.

We are thus brought to the consideration of the question as to whether the enactment is violative of any of the provisions ⁵¹⁰ of the constitution. The clause alluded to was added to the section by an amendment in 1887. Prior to that time the section provided for an application for substitution on the part of the indemnitor, who, by his own application, was permitted, in the discretion of the court, to step into the place of the defendant and assume all his liabilities in the action and defend in his place and stead. A question was raised with reference to the constitutionality of the provisions of the section before the amendment of 1887, and it then received the attention of this court in the case of *Hein v. Davidson*, 96 N. Y. 175, 48 Am. Rep. 612, in which it was held that the provisions of section 1421 of the Code of Civil Procedure, as they then existed, were not violative of the constitutional provision prohibiting the taking of private property without due process of law. This decision has been the subject of comment in this court. In the case of *Hayes v. Davidson*, 98 N. Y. 19, Ruger, C. J., says with reference to these provisions of the code: "Their constitutionality has been seriously questioned heretofore in this court, and was affirmed by us only after much hesitation and by a divided court." Again, in the case of *Dyett v. Hyman*, 129 N. Y. 351, 26 Am. St. Rep. 533, it is said: "It is only upon the theory that by a substitution of parties the owner is afforded an equivalent remedy for the wrong done him, against other responsible parties, that the legislation in question can find any justification." While we have no disposition to interfere with or to criticise the decision in *Hein v. Davidson*, 96 N. Y. 175, 48 Am. Rep. 612, we think the legislation then under review was upon the border line; that the rule recognized in that case

should not be extended, and that legislation dispensing with the safeguards then provided for cannot be sustained. The legislation then under review, as we have seen, left it discretionary with the court to determine whether the substitution of parties should be made, and section 1423 provided in substance that in case there was any question with reference to the responsibility of the indemnitor who sought to be substituted, he should be required to give satisfactory security, so that there could be no question with reference to the ability of the plaintiff to collect in case his right to recover ⁵¹¹ should be adjudged. But in the legislation now under review the substitution is made mandatory, leaving no discretion with the court when the application is made by the defendant in the action. The indemnitor may or may not be responsible. The court cannot compel the indemnitor to furnish security. He might not be able to do so. If the indemnitor was the moving party asking for a favor of the court, it might impose, as a condition of granting the favor, that additional security should be furnished. Further than this the court would not have the power to act.

Again, the legislation under review requires the plaintiff to litigate other and different questions from those involved in this action against the sheriff. The amount of the two bonds given by the indemnitor is only the sum of \$18,000, and they had been given before any levy was made by the sheriff. The amount of damage which the plaintiff alleges he has sustained by reason of the alleged unlawful acts of the sheriff, is the sum of \$142,000, with interest, etc. A question is thus presented as to whether the indemnitor can, in any event, be held liable for a greater amount than the penalty named in the bonds. If it should be held that such was the extent of the liability of the indemnitor, then the plaintiff by this legislation would be deprived of upward of \$120,000 of his claim, and given no other remedy or process of law therefor. There are other reasons which might be given, but we think those referred to are sufficient. We are clearly of the opinion that the amendment to the section passed in 1887, in so far as it requires the court to substitute the indemnitor upon the application of the sheriff in opposition to the wishes of the plaintiff, is in contravention of the provisions of the constitution referred to.

The order of the appellate division should be affirmed, with costs to the plaintiff and the National Surety Company, and the question certified answered in the affirmative.

All concur.

SHERIFFS.—A STATUTE SUBSTITUTING SURETIES, on an undertaking indemnifying a sheriff against a levy, as defendants in an action against him for such levy, is not unconstitutional: *Hein v. Davidson*, 96 N. Y. 175, 48 Am. Rep. 612. Compare *Dyett v. Hyman*, 129 N. Y. 351, 26 Am. St. Rep. 533, showing the liability of a sheriff's indemnitors under the code of New York.

RICE v. BUTLER.

[160 NEW YORK, 578.]

INFANTS—RESCISSION OF CONTRACT—ACCOUNTING FOR BENEFIT.—The privilege of infancy is to be used as a shield and not as a sword. Hence, an infant should not be allowed to rescind a contract, of which he has had the benefit, without accounting for such benefit or returning its equivalent.

INFANTS—PURCHASE ON INSTALLMENT PLAN—NATURE OF CONTRACT—ACTION FOR MONEY PAID.—If a bicycle is purchased by an infant, under a contract authorizing him to receive the wheel and to pay a part of the price upon delivery, the remainder to be paid in future weekly installments and the title to pass upon making all of the payments stipulated, the infant cannot, after having used the bicycle for a time and paid the accrued installments, return the wheel, before it is fully paid for, and maintain an action for a return of the money paid, upon the ground that the contract is executory. In its entirety, the contract is executory, but as to the payments made it is in a sense executed.

INFANTS—RETURN OF BICYCLE PURCHASED ON INSTALLMENT PLAN—ACCOUNTING FOR USE.—An infant who has purchased a bicycle on the installment plan, who uses it for a while and returns it before it is fully paid for, and who brings an action to rescind the contract and to recover the amount paid thereon, ought, in justice and in fairness, to account for the reasonable use or deterioration in the value of the wheel during the time intervening between its purchase and return, where there was no fraud on the part of the defendant in making the contract.

INFANTS—RETURN OF BICYCLE PURCHASED ON INSTALLMENT PLAN—VALUE OF USE—HOW DETERMINED. In determining the value of the use of a bicycle which an infant purchased on the installment plan, and who used it for a while, but returned it before it was fully paid for, such value must, in an action to rescind and to recover the payments made, be deemed, in the absence of wanton injury to the wheel, to include the deterioration in value, and the infant cannot recover when it is found that the use equaled the sum paid on the contract.

Action to recover money paid by a minor. The trial court and the county court found for the defendant, and the complaint was dismissed upon the merits. This judgment was reversed by the appellate division of the supreme court, and the defendant appealed. The questions certified were as follows:
1. Is the contract of purchase in the above-entitled action, so

far as the moneys paid upon said contract are concerned, an executed contract, and is the plaintiff unable to rescind said contract and recover back any moneys paid thereon by reason of said contract being an executed one, so far as the moneys actually paid in are concerned? 2. Is the plaintiff, being an infant, and having paid money on her contract and enjoyed the benefits thereof, bound to respond to the defendant for the deterioration in the value of the property caused by her use of the same, and, where the deterioration is more in value than the moneys paid in, unable to recover back the consideration paid? 3. Is the plaintiff, being an infant, and having received the property and used the same, bound to respond to the defendant for the use of said property by an application of the moneys paid in upon the contract, and where the rental value is more than the moneys paid in, unable to recover back the moneys paid in upon said contract? 4. Is the plaintiff in this action, having received the wheel in question into her possession and used it and deteriorated it in value, obliged to apply the moneys paid in upon the contract of purchase toward either the use or deterioration, and, if she is unwilling to make such application, does the law make such application for her?

Thomas Woods, for the appellant.

George F. Quinn, for the respondent.

581 HAIGHT, J. The appeal in this case is based upon the certificate of the appellate division to the effect that questions of law are involved which ought to be reviewed by this court. The action was brought in the municipal court of Syracuse to recover the sum of twenty-six dollars and twenty-five cents, paid by the plaintiff, a minor seventeen years of age, upon a contract for the purchase of a bicycle. The contract price was forty-five dollars; fifteen dollars were paid upon the execution of the contract, and the remainder was to be paid in weekly installments of one dollar and twenty-five cents. The plaintiff purchased the wheel in June and used it until about the 20th of September and then returned it to the defendant, asserting that she had been defrauded, and demanded repayment of the amount that she had paid upon the contract. The defendant took the wheel, but refused to return the money, claiming that the use of the wheel and its deterioration in value exceeded the sum paid. Upon the trial, evidence was submitted on behalf of the defendant tending to show that the use of the wheel and

its deterioration in value equaled or exceeded the amount that had been paid upon the contract. The trial court found in favor of the defendant, thus establishing the fact that there had been no fraud on the part of the defendant in making the contract.

It is now contended that the contract was executory, and that, being such, the plaintiff had the right to rescind and recover back the amount paid. The appellate division appears to have taken this view of the case, and has reversed the judgment. The question thus presented may not be free from difficulty. There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. ⁵⁸² We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but, in so far as the payments made were concerned, the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his Commentaries, volume 2, page 240, says: "If an infant pays money on his contract and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other."

In the case of *Gray v. Lessington*, 2 Bosw. 257, a young lady during her minority had purchased a quantity of household furniture, paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court, says: "When it becomes necessary for an infant to go into a court of equity, to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property

arising from its use is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration."

In the case of *Medbury v. Watrous*, 7 Hill, 110, an action was brought by an infant to recover for services performed, of the value of seventy dollars. The defense was that the work was done in part performance of a covenant to purchase of the ~~683~~ defendant a house and lot for the sum of six hundred dollars. He had not entered into the possession of the house and lot, and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under it, he could recover upon a quantum meruit for the work performed. Beardsley, J., in delivering the opinion of the court, refers to the rule laid down by Chancellor Kent, and then to the case of *Holmes v. Blogg*, 8 Taunt. 508, and says, with reference to the later case: "It was not shown what had been the value of the use of the premises demised, while the infant remained in possession. If that was less than the sum paid by him, it may well be that he ought to have recovered the difference." It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is, that the plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justness and in fairness, to account for its reasonable use or deterioration in value. Otherwise, she would be making use of the privilege of infancy as a sword, and not as a shield. In the absence of wanton injury to the property, the value of the use would be deemed to include the deterioration in value, and, under the evidence in this case and as found by the trial court, the use equaled the sum paid. Our attention has been called to the cases of *Pyne v. Wood*, 145 Mass. 558, and *McCarthy v. Henderson*, 138 Mass. 310, but we think the rule suggested by us is more equitable and that they should not be followed.

The judgment of the appellate division should be reversed and that of the trial and county court affirmed, with costs, and the second, third, and fourth questions certified to us answered in the affirmative. An answer of the first question is not deemed necessary further than intimated in the opinion.

All concur.

INFANTS' CONTRACTS—DISAFFIRMANCE—ACTION FOR MONEY PAID—ACCOUNTING FOR BENEFIT.—An infant may

avoid a contract of a personal nature, or one relating to personal property, either before or after his majority: See monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 668, on contracts of infants; *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379. Executory contracts of infants are no more invalid than executed contracts. Both are binding until disaffirmed: Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 579. An infant may rescind a contract for the purchase of personal property, and recover back the purchase money paid by him, at least where he restores, or offers to restore, the property which he has received under the contract, to the seller; and, it has been held that, in such an action, the vendor will not be entitled to recoup for the use of the property while in the possession of the minor; and that the infant's right of recovery is not affected by the fact that the property sold had depreciated in value while in his possession, by reason of use or otherwise: Note to *Craig v. Van Bebber*, 18 Am. St. Rep. 597. On the other hand, the infant is held to be chargeable with the equivalent of the consideration, where it cannot be returned. Thus, an infant purchased a horse of the defendant, and paid for it in property. He kept the horse about a month, during which time, in consequence of his misuse of it, its value was greatly lessened, and then tendered it back to the defendant, and demanded the property he had delivered to the latter. It was held that he could not recover the property on a refusal to deliver it: *Craig v. Van Bebber*, 18 Am. St. Rep. 690. See, also, the same note at page 684. If the personal contract of an infant, beneficial to himself, is free from any element of fraud or bad faith, and is reasonable and fair, except that his payments exceed the value of what he has received, his recovery should be limited to such excess: *Johnson v. Northwestern etc. Life Ins. Co.*, 56 Minn. 365, 45 Am. St. Rep. 473.

SOLOMON v. CONTINENTAL FIRE INSURANCE COMPANY.

[160 New York, 595.]

INSURANCE, FIRE—"IMMEDIATE" NOTICE OF LOSS.—If a notice of loss is required by an insurance policy to be "immediate," the requirement is met if the notice is given within a reasonable time and with due diligence under the circumstances of the case. "Immediate," like "forthwith," does not mean instantly.

INSURANCE, FIRE—NOTICE OF LOSS—SERVICE OF, WITHIN A REASONABLE TIME—WHAT IS.—If the defense to an action on an insurance policy, brought by the general assignee of the insured, is that the plaintiff omitted to give "immediate" notice of loss required by the policy, and it appears from the evidence that the policy was transferred before the fire to the plaintiff, who had no knowledge of its contents; that the plaintiff used due diligence to discover the policy, which had accidentally fallen behind a case of pigeon-holes in the plaintiff's office, and to ascertain what it required; that, notwithstanding such diligence, he obtained neither the policy nor any information that it required notice of loss until about fifty days after the fire; and, that a notice dated three days after obtaining possession of the policy, was prepared and served with due diligence, the company receiving it three days after its date—it cannot be held, as a matter of law, that the service of the notice of loss was not within a reasonable time, or that the defendant did not receive sufficient notice of the plaintiff's loss under the condition of its policy.

Action brought by Solomon, as assignee for the benefit of creditors of Henry Thoesen, to recover upon a fire insurance policy. There was a judgment in favor of the plaintiff, entered upon the report of a referee. The appellate division of the supreme court made an order affirming this judgment, and the insurance company appealed.

Michael H. Cardozo and William C. Trull, for the appellant.

Abram Kling, for the respondent.

⁵⁹⁷ MARTIN, J. This action was to recover upon a fire insurance policy issued by the defendant to the plaintiff's assignors, and with its consent transferred to the plaintiff.

⁵⁹⁸ The defense was based upon the single ground that the plaintiff omitted to give the notice of loss required by its policy. It was a New York standard policy, and contains the following provisions: "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company. . . . No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

The issue arising upon this defense was tried before a referee, who decided that, under the facts and circumstances disclosed by the evidence, the defendant received sufficient notice of the loss within the requirements and conditions of the policy. As the decision of the referee does not state separately the facts found by him, and as the judgment entered thereon has been affirmed by the appellate division, upon this appeal all the facts warranted by the evidence and necessary to support the judgment are presumed to have been found: *Amherst College v. Ritch*, 151 N. Y. 282.

The circumstances which surrounded the plaintiff after the loss were unusual and peculiar. He was an assignee of the parties originally insured, and the defendant's consent to the transfer of the policy to the plaintiff was not obtained by him personally, but by another. There were many other policies upon the property.

Under the evidence the referee was justified in finding that the plaintiff had no knowledge of the contents of the policy in question, and that he obtained neither the policy nor any information that notice of loss was required by its provisions, until the last week in January, 1894, which ended on the thirty-first day of that month, or until about fifty days after the fire

and three days before the date of the notice. This notice was received February 6th, as appears by a letter from the defendant to the plaintiff. A Sabbath intervened between the date of the notice and its receipt by the defendant. The fire occurred upon the sixteenth day of December, 1893. The ⁵⁹⁹ policy was upon a stock of merchandise consisting principally of furniture. The building containing it was totally destroyed. The defendant was apprised of the destruction of the building and its contents upon the morning of the fire through a printed notice left with it by the committee of the fire patrol. This notice disclosed that the entire building was destroyed, and that it was occupied for furniture and storage.

At the time of the fire the policy in suit was in a safe in the building destroyed. The safe was removed from the ruins about six days afterward, but the plaintiff was unable to open it. It was then taken to the manufacturer for that purpose. When finally opened it was evening and dark. Its entire contents, which consisted of a great number of books and papers, were at once removed and placed in a vault in the building where the plaintiff had his office. On the following morning, he searched for the policy in the vault and among his papers, but was unable to find it as it had fallen to the floor behind a case of pigeon-holes, where it was subsequently found. It was not until the last week of January, and, as one witness testified, about fifty days after the fire, that the policy was found.

The plaintiff had no books or papers in his possession which disclosed the names of the companies which had policies upon the property in question, and had no knowledge of the defendant's policy or of its requirements. While there was a conflict in the evidence bearing upon the question of the plaintiff's knowledge of the existence of this policy and its provisions, and in regard to his ability to obtain it, still, whether he had such knowledge or was able to obtain it earlier, was, under the evidence, a question of fact to be determined by the referee. It is obvious that the plaintiff could have had no purpose in delaying to serve the notice of loss beyond the time when it could be reasonably accomplished.

If the plaintiff exercised due diligence in seeking to obtain the policy, and in seeking for the information which would enable him to give the required notice, and he was unable to ⁶⁰⁰ obtain it until three days before the date of the notice and six days before it was received by the defendant, it can hardly be held, as a matter of law, that the service of the notice was insufficient or too late under the requirements of the policy.

Whether, under all the circumstances, immediate notice was given within the meaning of the policy, when fairly construed, was the question to be determined in this case. The word "immediate," like "forthwith," does not mean instantly, but immediate notice is notice within a reasonable time. In determining what was a reasonable time, it was necessary for the referee to take into consideration the situation of the plaintiff and all the circumstances by which he was surrounded. If they justified him in finding that the plaintiff used due diligence in discovering the policy, in ascertaining what it required, and in preparing and serving the notice of loss, then the referee was justified in determining that the notice was sufficient under the provisions of the policy.

May, in his work on Insurance, in effect says that, if the notice is required to be immediate, the requirements will be met if it is given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily the judges.

In *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459, the policy provided that the assured should forthwith give notice to the company of the fire, and as soon after as possible render a particular account of the loss. The fire occurred March 8, 1876. The affidavit to the proofs of loss was sworn to April 18, 1876; they were served May 16, 1876, and it was held that the omission to serve the proofs at an earlier period was not an absolute bar to a recovery, but that the question whether the delay was unreasonable or not was one of fact for the jury.

In *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, where proofs of loss were not served until one hundred and fifteen days after the fire, it was held that the plaintiff was required to serve them within a reasonable time, and that the question ⁶⁰¹ whether that was a reasonable time was a question of fact and properly submitted to the jury.

In *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417, 53 Am. Rep. 202, it was held that under the provision of a policy requiring the insured to forthwith give notice of loss, it was enough if he acted in the matter with diligence and gave the notice without unnecessary delay, and that the question whether the delay was or not unreasonable was one of fact for the jury.

In *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468, 475, where the notice was required to be served forthwith, in determining the effect of that provision it was said: "This provision has never been construed literally to re-

quire notice on the day. It has always been held that due diligence under all the circumstances was all that was required": *Inman v. Western etc. Ins. Co.*, 12 Wend. 452. The case of *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468, was reversed (*New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85) upon another ground, but was subsequently cited upon this question with approval in *Bennett v. Lycoming County Mut. Ins. Co.*, 67 N. Y. 274, where the same doctrine was reasserted. The latter case was cited with approval in *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 458, 61 Am. St. Rep. 627, where it was, in substance, said that the words "immediately after the fire," as used with reference to the notice of loss, are to be construed not literally, but in the light of what may be reasonable and possible in the case at hand.

In several recent cases, this court has discussed the distinction between the two classes of conditions which are to be found in policies of fire insurance. As to those which operate upon the parties prior to the loss, such as the condition and situation of the property, the relations of the insured to it, and the statements and representations preceding the contract, it has been said that they are matters of substance upon which the liability of the insurer depends, are important in pointing out the conditions and circumstances under which the insurer has agreed to become liable, and, consequently, should receive a fair construction according to the intention of the parties. It has also been said in the same cases that where the liability ⁶⁰² of the insurer has become fixed by a loss within the range of the contract, courts are reluctant to deprive the insured of the benefit of that liability by any narrow or technical construction of the conditions which prescribe the formal requisites by which the right is to be made available, and, therefore, that those provisions should be reasonably and not rigidly construed: *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73; *Sergeant v. Liverpool etc. Ins. Co.*, 155 N. Y. 349, 355.

While it may be that if the question of the plaintiff's reasonable diligence was before us to determine as a question of fact, we might reach a conclusion adverse to that of the referee, still, under the proof and peculiar circumstances of this case, and in view of the authorities to which we have referred, we are of the opinion that this court cannot hold, as a matter of law, that the service of the notice of loss was not within a reasonable time, or that the referee was not justified in finding that the defend-

ant received sufficient notice of the plaintiff's loss under the condition of its policy.

We have examined the various authorities cited by the learned counsel for the appellant, but think none is in conflict with the conclusion reached, as those cases arose under circumstances which render them clearly distinguishable from the case at bar.

We have reached the conclusion that this judgment should be affirmed with less reluctance than we otherwise would, as it is evident from the proof that the defendant was sufficiently apprised of the fire on the same day it occurred to afford it an opportunity to make any investigation or adopt any means it deemed necessary for the protection of its interests.

The judgment should be affirmed, with costs.

Parker, C. J., O'Brien, Bartlett, and Haight, JJ., concurred with Martin, J., for affirmance.

VANN, J., dissented. "The policy in question," he said, "required the insured to give 'immediate notice' of any loss to the insurers, and prohibited any suit for recovery until after full compliance with this condition. We have recently determined that those interested in such a policy must make reasonable efforts to observe this requirement and to remove obstacles in the way of performance: *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627."

The policy in question was issued to the plaintiff's assignor, Henry Thoesen, and the circumstances under which it was misplaced or lost for a time are stated in the prevailing opinion. The question, therefore, was not what diligence the plaintiff had used to obtain manual possession of the policy, but what effort did he make to learn its contents in some other way. At the date of the assignment, the plaintiff had, for nine years, been in the employ of the assignor, and after the assignment the assignor was employed by him. The plaintiff knew of the existence of the policies, although, owing to the confusion caused by the fire, he did not find them for about fifty days. Before the fire he had the policy in suit, with many others, transferred to him as assignee, by Barbour & Durbrow, the firm of brokers who procured the insurance. He knew that they had been the brokers of the assignor for about seven years prior to the assignment. He knew where their office was, not far from his own, and had kept an account of the moneys paid them for insurance, although there was no record of the policies on the books of the assignor.

The plaintiff testified that on the day of the fire he called at the office of the brokers to see about the insurance, but was told by Mr. Brunner, a clerk, that he would have to see Mr. Barbour, and that the latter was not in. "That," said the witness, "is the last I saw

of either Mr. Brunner or Mr. Barbour." He testified on cross-examination that after January 1, 1894, the fire having occurred December 16, 1893, he might have gone again to Barbour & Durbrow's office; that he did not go there and ask for a list of the insurance companies; that he did not get any list from the brokers, or anyone else; and that, at the time of the fire, he did not have any such list in his possession. When asked, shortly after the fire, on examination by the fire marshal, whether a list of the policies could not be obtained from the brokers, he said, "Very likely."

"This," said his honor, "was substantially all the evidence given by the plaintiff upon the subject, except that he sent the assignor, who had died before the trial, to the broker's office on the third or fourth day after the fire, but it did not appear for what purpose, or what transpired. He did not testify or show that he was unable, for any reason, to get a list of the insurance companies, or that any effort was made to that end, except as stated.

"At the close of the evidence, the defendant moved to dismiss the complaint upon the ground, among others, that the plaintiff 'had the means of acquiring all the information necessary to enable him to comply with the terms of the contract of insurance requiring him to give to the defendant immediate notice of the loss as therein provided.' The referee did not separately state the facts found by him, but decided 'the issues in this action in favor of the plaintiff,' and directed judgment accordingly for the amount of the policy. Upon appeal, the judgment was affirmed, but by a divided vote.

"The burden of proof," said the dissenting judge, "was upon the plaintiff to show either that the condition was substantially fulfilled, or that the delay was reasonable, and hence excusable, under all the circumstances. According to his own testimony, I do not think he used due diligence to ascertain the contents of the policy and fulfill its conditions.

"As the plaintiff was only an assignee, under a general assignment for the benefit of creditors, and had never read the policy, the referee was justified in finding that he had no knowledge of this condition when the fire occurred. Since he did not obtain actual possession of the policy for a long time after the fire, owing to peculiar circumstances not affected by want of diligence on his part, as the referee found, he was not responsible, simply on that account, for not sooner learning the contents of the policy and complying therewith. He was, however, although merely an assignee, bound by the rule of due diligence, for he stood in the shoes of his assignor. It was his duty to make reasonable efforts to ascertain and perform what the policy required on the part of the insured, for it will be presumed that, as a business man of ordinary intelligence, he was somewhat familiar with such a common contract, and knew that there were conditions to be observed by the insured in case a fire occurred. Because he failed to obtain the manual possession of the policy, he was not relieved of all effort to learn its

contents in some other practicable way. The authorities require one in his situation to act with reasonable diligence, and, if he does so, the condition as to immediate notice of the loss is not broken, even if there is a long delay: *Bennett v. Lycoming etc. Ins. Co.*, 67 N. Y. 274, 277; *Wheeler v. Connecticut etc. Ins. Co.*, 82 N. Y. 543, 87 Am. Rep. 594; *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417, 53 Am. Rep. 202; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 401. Nonperformance of the condition, however, when unexcused, is an absolute defense to an action on the policy: *Quinlan v. Providence etc. Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645.

"An insurance contract, in case of doubt as to its meaning, should be construed most favorably to the insured and against the insurer, who is responsible for the doubt. This is especially true after a fire has occurred and the liability of the company has, to a certain extent, become fixed thereby. The insurer, however, cannot, by construction, be deprived of all benefit from a plain provision of its contract. Some effect must be given to the clause requiring immediate notice, which cannot be construed out of the policy altogether. Notice given fifty-three days after the fire is not 'immediate,' still the delay may be excused by the insured. The main question in this case is whether the plaintiff met the burden of excusing his delay by sufficient evidence of diligence. In my opinion he did not meet the requirements of the law by showing that he made a reasonable effort to secure the information necessary to enable him to perform the contract. He knew where he could get a list of the policies, and this would have enabled him to call on the company and ask what there was for him to do, or get a copy of the policy. If the company refused, he could safely rest on the refusal. He did call on his brokers, but they were not in. He says he may have called again, but he fails to state what he did. According to his own statement, he never asked either of them for any information. He did speak to their clerk and was told that he would have to see one of the firm, who was not in. Thereupon he left, and, as he states, that was the last he saw of broker or clerk. As was said in the dissenting opinion below: 'Thus the plaintiff admits his own deliberate negligence. Why did he not return and see Barbour? He is silent upon that point. Why did he not ask Thoesen? Again he is silent. In fact, he seems to have studiously avoided making either inquiry or search.'

"Reasonable effort did not require a long journey or great expense or much time. The effort of an hour would doubtless have sufficed. All he had to do was to ask his broker for the information, and if he refused to give it, perhaps that would have been enough to make a question of fact for the referee.

"But he did nothing, or substantially nothing. The obstacles in *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 61 Am. St. Rep. 627, were more serious and the diligence used greater, yet we held that the insured was not entitled to recover, because he did not comply with the condition, or make reasonable efforts to do so. In-

stead of doing his best, the plaintiff did virtually nothing, and his default, as I view it, stands wholly without excuse. I think there was no question of fact for the referee in this regard, and that it was his duty to grant the motion of the defendant and dismiss the complaint. Upon the evidence as now presented the plaintiff was not entitled to recover. While all the equities are apparently with the plaintiff, and the position of the defendant seems harsh, I respect its legal rights and vote for a reversal." Gray, J., concurred with Vann, J., for reversal.

INSURANCE—"IMMEDIATE" NOTICE—NOTICE "FORTHWITH."—A clause in a policy of insurance requiring notice to be immediately given, in case of accident or loss, must have a reasonable construction, according to the circumstances of the particular case. If notice of loss is required to be given "forthwith," it is only necessary that such notice be given with due diligence under the circumstances of the case: *Mandell v. Fidelity etc. Co.*, 170 Mass. 173, 64 Am. St. Rep. 291, and note. A condition in the policy that notice of loss must be given "forthwith" is synonymous with a condition that such notice must be given within a "reasonable" time: *Note to Ermentrout v. Girard etc. Ins. Co.*, 56 Am. St. Rep. 487; that is, without unnecessary delay, or with reasonable diligence under the circumstances of each particular case: *Note to Burlington Ins. Co. v. Lowery*, 54 Am. St. Rep. 199. While the assured must not be guilty of needless and intentional delay, where "immediate" notice is required, yet he is not bound to act instantly, nor without taking reasonable time to procure such information as the requirement is intended to furnish to the party to be notified: *Mandell v. Fidelity etc. Co.*, 170 Mass. 173, 64 Am. St. Rep. 291. Where no excuse for delay is given, the insurer is discharged from liability: *Note to Ermentrout v. Girard etc. Ins. Co.*, 56 Am. St. Rep. 487.

HOFFMAN v. KING.

[160 NEW YORK, 618.]

RAILROADS—SPARKS—DUTY TO PREVENT FIRE FROM.—Properly constructed locomotives, with the most approved spark-arresters, will, of necessity, emit some sparks. Hence, in periods of drought, it is the duty of a railroad company to keep its right of way free from combustible material which is liable to be ignited from sparks so emitted, and a failure to do so is negligence.

NEGLIGENCE—FIRES—RULE OF LIABILITY—WOODLANDS.—The rule of liability for fires negligently set, in woodlands as well as in cities, villages, and other localities, is that the damage must be the proximate result, or natural and direct effect, of the negligent act.

NEGLIGENCE—LOSS FROM FIRES WHICH HAVE SPREAD OVER INTERVENING LANDS—LIMIT OF LIABILITY.—If a person lights a fire upon his own premises, on which he has maintained inflammable material extending to his neighbor's lands, and the fire, fed by this material, spreads upon abutting lands, the damage is the proximate result of the act and a liability exists; but this is the limit, and, if the fire once set runs across the

lines of an abutting owner, and upon the lands of other proprietors, the damage caused to the latter is the remote result of starting the fire, and the one who started it is not answerable for such damage.

RAILROADS—LOSS FROM FIRES WHICH HAVE SPREAD OVER INTERVENING LANDS—LIMIT OF LIABILITY.—Although a railroad company negligently sets a fire in inflammable material on its right of way, it is not answerable for damages caused by the spread of the fire upon the plaintiff's land, where other lands, such as woodlands covered with inflammable material, and over which the company has no control, intervene between the right of way and the plaintiff's land, and without which the fire could not have extended upon the plaintiff's premises.

NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.—Proximate cause is that which immediately precedes and produces the effect, and, where the evidence is undisputed, the question as to what is proximate cause is always for the court, and not for the jury.

Action to recover damages, brought by Hoffman against King and another, as receivers of a railroad. In the trial court, there was a judgment in favor of the plaintiff, entered upon a verdict, and an order denying a motion for a new trial. This judgment was affirmed by the appellate division of the supreme court, and the defendants appealed.

Henry Bacon, for the appellants.

John F. Anderson, for the respondent.

⁶²¹ **HAIGHT, J.** This action was brought to recover damages alleged to have been occasioned by a fire negligently set by the defendants or their employés. The negligence complained of consisted in allowing to accumulate upon the corporation's right of way inflammable material which was liable to become ignited from the sparks emitted from passing locomotives. The evidence tended to show that the fall before the defendants had caused sweet fern brush, huckleberry brush, weeds, and stuff to be mowed, which they then permitted to lie upon the ground, and that it was in this material the fire started and spread upon adjoining lands and thence across the lands of several intervening owners for a distance of two miles upon the plaintiff's lands, causing the ⁶²² damage that is sought to be recovered in this action. The trial court submitted the question of negligence to the jury upon the theory that properly constructed locomotives, with the most approved spark-arresters, will, of necessity, emit some sparks, and that, consequently, in periods of drought, the duty devolved upon the defendants of keeping their right of way free from combustible material which was liable to be ignited from sparks so emitted. We think the case is free from error in this respect.

The only question which requires consideration here is as to whether the damage to the plaintiff is the natural and proximate result of the negligence complained of, or is so remote that it would not be reasonably expected as a result of such negligence. At the conclusion of the plaintiff's evidence the defendants' counsel moved for a dismissal of the complaint, upon the grounds, among others, that the testimony showed that the fire had burned two days, and had crossed over more than two miles of country before it reached the plaintiff's lands; that the fire which started on the defendants' right of way was not the probable or proximate cause of the plaintiff's injury, and that such a result was not to be reasonably anticipated. This motion was denied and an exception was taken by the defendants. It was again renewed at the close of the evidence, in substantially the same form, and met with a similar ruling, to which an exception was also taken.

At common law, every master of a house or chamber was bound to so keep his fire as to prevent it from occasioning injury to his neighbors. If a fire broke out in a house and burned an adjoining dwelling or did other damage, the master of the house in which the fire began was liable to make compensation. It was not necessary to prove negligence; the law presumed it: Year Book, 2 H. 4, pl. 18; 1 Blackstone's Commentaries, 431.

This law was first changed by statute of 6 Anne, chapter 31, which provided that: "No action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own ⁶²³ or their servants' carelessness." This statute was amended by 14 George III, chapter 78, which provided that: "No action shall be brought against any person in whose house, chamber, or other building, or whose estate any fire shall accidentally begin, any law, usage, or custom to the contrary notwithstanding." The provisions of these statutes have been limited to accidental fires and not to those negligently set; under the statute, however, negligence will no longer be presumed, but must be shown by the party asserting it: *Filliter v. Phippard*, 11 Ad. & E., N. S., 347.

We thus call attention to the law of England for the purpose of better understanding our own authorities upon the subject.

The first case to which we call attention is that of *Ryan v. New York Cent. R. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49. In that case, the defendant, through careless management of, or defects in, one of its engines, set fire to its woodshed in the city

of Syracuse, and the fire was communicated from such burning building to the plaintiff's house, which was consumed. An action was brought to recover from the railroad company the value of the building destroyed. A nonsuit was granted at circuit and the judgment entered thereon was affirmed in the general term and in this court, for the reason that the damages were too remote and were not the natural and expected result of the firing of the woodshed. Hunt, J., in delivering the opinion of the court, says: "If, however, the fire communicates from the house of A to that of B, and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C, and thence to the house of D, and thence consecutively through the other houses, until it reaches and consumes the house of Z, is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A recovers and Z fails? . . . In the destruction of the building upon which the sparks were thrown by the negligent ⁶²⁴ act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. In the second, third, or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed is not a necessary or a usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects."

In *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389, the defendant's engine dropped a live coal upon a tie and set it on fire. Weeds, grass, and rubbish had been permitted to accumulate from that place to the fence of the defendant's right of way. The defendant's engine was defective and the coal was negligently dropped. At the time, a strong wind was

blowing, and it was a season of extreme drought. The fire quickly ran through the grass and rubbish to the defendant's fence and then spread upon the plaintiff's next adjacent woodland, destroying his timber and causing damages for which the action was brought. It was held in that case that the accumulation of the weeds, grass, and rubbish through which the fire was communicated to the plaintiff's premises was one of the elements of negligence with which the defendant was chargeable, and for that reason the defendant was liable; that it was in effect the same as if the defendant had thrown the coal which set the fire directly upon the plaintiff's lands and there started the fire. Folger, J., in delivering the opinion of the court, enters upon a consideration of the rule ⁶²⁵ at common law and the Ryan case, and discusses the question of proximate cause and results necessarily and reasonably to be expected, and approves the rule that the liability of a person extends to his immediate neighbor only for the damages caused to him by the spread of the fire upon his next adjacent or contiguous property. In commenting upon the Ryan case, he says: "It announces no new principle. It recognizes the principle which it adopts as one before that established, and, applying it to the facts therein existing, holds the damage sued for was not the necessary and natural result of the negligent act."

In *Frace v. New York etc. R. R. Co.*, 143 N. Y. 182, the action was brought to recover damages for the destruction of a barn and hotel. The evidence showed that the barn first caught fire, and it was a controverted question of fact upon the trial as to whether the hotel building took fire from coals emitted from the engine or from fire communicated from the burning barn. The trial judge charged the jury that, "to justify a verdict covering or including the value of the hotel, you must find that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies and arising from other causes. This is a question for you to determine from the evidence." Peckham, J., in delivering the opinion of the court, says with reference to this charge: "We think the charge of the learned judge upon this part of the case was as favorable to the defendant as it could properly ask. The question was left as one of fact, under all the circumstances, as to whether the burning of the hotel were not the natural and direct result of the sparks from the engine. In this case the court committed no error to the prejudice of the defendant."

In *Reed v. Nichols*, 118 N. Y. 224, the action was for damages caused by a fire which destroyed two of the plaintiff's buildings. A strong wind carried sparks from a smokestack belonging to the defendants to the roof of a building two hundred and eighty feet distant, setting it on fire. After the building commenced to burn, the wind died down and changed its course; the fire ⁶²⁸ communicated to another building north and thence across the street to a barn of the plaintiff, then a building north of the one first set on fire, and from it spread to and destroyed another building of the plaintiff. It was held that the burning of the plaintiff's buildings was not the proximate, but was the remote, result of the negligent acts complained of, and that there could be no recovery.

In *O'Neill v. New York etc. Ry. Co.*, 115 N. Y. 579, the action was brought to recover damages for injuries to woodlands belonging to the plaintiff, which, it was claimed, had been set on fire through the negligence of the defendant. It appeared that sparks from a locomotive passing on the defendant's road set fire to brushwood, rails, and other combustible material which it had allowed to accumulate on its lands. The fire spread to the lands of C., and from thence to the lands of plaintiff. The plaintiff was permitted to recover. On review in this court it was claimed that the damages were too remote. It was held that this question could not be reviewed, for the reason that the point was not raised nor presented to the trial court. Danforth, J., in his opinion, however, proceeds to comment upon the question, saying: "The fact that land of a third party intervened between the woodland of the plaintiff and the defendant's road cannot be doubted, but that alone is not decisive. Other circumstances would control, and, if not already apparent in evidence, we cannot say that further testimony would not have shown that the result was to have been anticipated from the moment fire dropped upon the defendant's premises, and that the destruction which happened to the plaintiff's property was the natural and direct effect of the first firing. If so, it was not remote."

In *Martin v. New York etc. Ry. Co.*, 62 Hun, 181, an action was brought to recover damages to woodlands by a fire started negligently, which had spread over the lands of other persons, which intervened, and thence to the plaintiff's lands, nearly a mile distant from the point where the fire began; it was held that the plaintiff could recover.

We do not deem it important to refer to other cases, for ⁶²⁷

those cited show the place at which the authorities diverge. If the comments in the opinion in the O'Neill case are to be adopted as the basis of liability in future cases, then a different rule must be recognized with reference to fires set upon woodlands from that existing in cities, towns, and villages. In the O'Neill case, the question now under consideration was not raised, and the learned judge writing the opinion says: "It, therefore, cannot be listened to." He, notwithstanding, did proceed to comment upon the question as we have shown, and it is doubtless true that since the publication of the opinion the courts of original jurisdiction and the legal profession have generally supposed that a new rule had been adopted. It is, however, clear that the comments were not essential to the decision then made, being merely dictum, and we, consequently, are at liberty to again consider the subject.

Is there any good reason for a different rule of liability with reference to fires on woodlands from that existing in cities and villages? It is said that inflammable material is common upon woodlands, and that a fire once ignited will continue to burn until checked by a change of wind, or quenched by the fall of rain. But this is also true with reference to our villages and many of our large cities where the buildings are chiefly constructed of wood. In these localities inflammable material abounds to feed a flame once started, and a fire in a burning building during a strong wind is liable to spread and produce damages a hundred-fold greater than any probable injury resulting from such a fire on woodlands. Exceptions to the general rule are not favored in the law, unless a necessity therefor exists. No such necessity is apparent to our minds, and we think no good reason exists for establishing a different rule of liability with reference to woodlands from that existing in cities, villages, and other localities. What, then, is the rule of liability for fires negligently set? We think this question is fully answered by the common law and the cases in our own court, to which we have referred. The damage must be the proximate result of the negligent act. It must be such as the ordinary mind would reasonably expect ⁶²⁸ as a probable result of the act, otherwise no liability exists. If a person negligently throws a live coal of fire upon another's building, causing it to burn, the damages are the direct result of a negligent act, and the result is that which the ordinary mind would reasonably expect. If a person lights a fire upon his own premises, upon which he has maintained inflammable material extending to his

neighbor's lands, and the fire, fed by this material, spreads upon abutting lands, the damage is the proximate result of the act and a liability exists, and this, we think, is the limit. It is contended that liability ought not to be thus limited; that a fire once set may run across the lines of an abutting owner and upon lands of other proprietors, causing damage. It must be conceded that such a result often happens. It did in the case we have under consideration. But where is the line to be drawn? Shall it be one mile, two miles, or ten miles distant from the place of the original starting of the fire? Who is to specify the distance? It is suggested that it might be left to the jury; but a jury in one part of the state might answer one mile, and in another part it might determine the rule of liability to extend ten miles. The evidence upon this branch of the case is undisputed, and in such cases the question as to what is proximate cause is always for the court and not for the jury.

While we appreciate the force of the argument in favor of extending the rule of liability, and recognize the fact that a limitation of the rule will deprive many persons of a right of action for damages, we are convinced that the old rule is wiser and more just and that we ought not to depart from it. The limitation may be somewhat arbitrary, but it recognizes the principle that we should live and let live. Fires often occur from the trivial acts of most prudent persons. Great conflagrations are daily reported. Not long since one of our largest cities substantially disappeared within a single day. No person, however cautious, is exempt; misfortune may overtake him in a forgetful moment, or through fault in the members of his family or servants. No man is able to answer for all the remote consequences of his acts and those for whom ⁶²⁹ he is responsible. Hence, the wisdom of the rule of proximate cause which, as defined by Webster, is that which immediately precedes and produces the effect. The fire set by the defendant did not immediately precede the fire upon the plaintiff's land; other lands intervened covered with inflammable material over which the defendant had no control, and without which the fire could not have extended upon plaintiff's premises. The drought, atmosphere, and wind were the principal agents assisting the fire in its work of destruction, and were the intervening causes of the damage. It is unfortunate for the plaintiff, but we think her damage was the remote and not the proximate result of the defendant's fire.

The judgment should be reversed and a new trial ordered, costs to abide the event.

Gray, O'Brien, Bartlett, and Martin, JJ., concurred with Haight, J., for reversal.

VANN, J., dissented. "We must assume," he said, "from the record before us that the defendants, during a dry time, and when a high wind was blowing, negligently started a fire on the lands of the railroad corporation represented by them as its receivers, and that such fire spread in a continuous and direct line over woodlands belonging to several proprietors for a distance of about two miles to those of the plaintiff, and there destroyed fences and standing timber belonging to her worth seventy-five dollars. All the lands burned over were forest lands, except those of the railroad company, which consisted simply of the usual strip for a right of way. As one of the witnesses testified: 'Between the origin of the fire and Mrs. Hoffman's line it was a continuous line of wooded land. The fire burned pretty rapidly the whole distance. The grounds in that distance were covered with brush of all kinds strewn about, and leaves, treetops, and limbs, and that extended clear through to the land of Mrs. Hoffman.'

"The main question for decision is whether the damage done to the plaintiff's property was the natural and proximate result of the defendant's negligence. If it was, it is conceded that she was entitled to recover, but if it was not the defendants must prevail. The trial judge charged that even if the defendants were negligent, still the jury could not find for the plaintiff unless the destruction of her property 'was the natural and direct effect of such negligence.' As there was a verdict for the plaintiff and the judgment entered thereon has been affirmed by the appellate division, but not unanimously, so far as the record shows, if the evidence, according to any reasonable view thereof, sustains the finding, it is conclusive upon this court, provided the question of proximate cause was one of fact. Even where there is no conflict of evidence, if diverse inferences may be drawn from the conceded facts, the question is for the jury."

The learned judge then cited and commented upon *Ryan v. New York Cent. R. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49, *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389, *Frace v. New York etc. R. R. Co.*, 143 N. Y. 182, and *O'Neill v. New York etc. Ry. Co.*, 115 N. Y. 579, referred to in the prevailing opinion, but he made a distinction between fires on woodlands and those in cities or villages, with respect to the rule of liability where such fires are negligently set. He contended that the case of *Ryan v. New York Cent. R. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49, had been criticised or distinguished, if not to some extent, at least overruled, in *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389, *Pollett v. Long*, 56 N. Y. 200, 206, *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158, 52 Am. Rep. 12, and *Read v. Nichols*, 118 N. Y. 224, and said, with respect to that case: "It cannot now be regarded as in all respects the

law of the state, because it is well established that one who negligently sets a fire upon his own premises, which spreads to the premises immediately adjoining and destroys the property of another thereon, is liable to the latter for the damages sustained by him": *Citing Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389. The dissenting judge seemed to adopt the rule laid down in *O'Neill v. New York etc. Ry. Co.*, 115 N. Y. 579, as the basis of liability in cases where woodlands of a plaintiff were set on fire through the negligence of the defendant. In that case it was said that the fact that the fire had reached the plaintiff's woodlands by first burning the brush and other articles on other lands did not furnish any new cause to which the injury could be ascribed, and a recovery was sustained. "The question now before us," said the dissenting judge, "was treated as before the court in that case," referring to *O'Neill v. New York etc. Ry. Co.*, 115 N. Y. 579, "and it was reviewed and apparently decided. It is so stated in the headnote, and the case has been generally regarded both by the courts and by the legal profession as settling the law other than as it is laid down in *Ryan v. New York etc. R. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49, at least so far as woodlands are concerned: *Brush v. Long Island R. R. Co.*, 10 App. Div. 535, 540; *Brown v. Buffalo etc. R. R. Co.*, 4 App. Div. 465, 469; *Martin v. New York etc. Ry. Co.*, 62 Hun, 181, 184."

"There is some reason," he said, "for a distinction between woodlands and buildings crowded together in a city, because in the latter case there are facilities for putting out fires, and the damages from a conflagration might be so overwhelming as to prevent men from investing in city property, which would affect the general welfare of the country. In populous places, an arbitrary rule, founded upon division lines, may be necessary when a broad view of the subject is taken, in order to prevent ruin to the owners of real estate. Such a rule, however, must exist owing to necessity rather than logic, for it would make one who negligently kindled a fire on his own premises liable to the owner of lands immediately adjoining, even if his building extended one hundred feet, but not to several owners of different buildings upon precisely the same land. It is impossible to say, logically, that the first hundred rods of woodland burned over, if owned by one man, must be paid for, but not if owned by two or ten men. If the fire in question had burned a hundred trees, extending directly from the railroad land in a straight line, one rod apart, for a hundred rods, all owned by one man, the defendants would be liable for the whole loss; and if the same man had owned all of those trees, except the first, it would be unjust and unsatisfactory to hold that he could recover nothing. If the plaintiff had owned the entire territory burned over, the defendants would be bound to pay all the damages, and the mere fact that there were several proprietors should not prevent a recovery by any except the abutting owner.

"Arbitrary rules should be strictly limited to the peculiar facts which render them necessary, and should not be extended to cases

which may be decided upon reasonable and logical grounds. There is no necessity for such a rule in the case of forest lands, because they are not so valuable as to threaten ruin to the owner, and facilities for extinguishing fires are so meager as to make it probable that a fire once started therein will run until arrested by some natural or artificial cause. Where the forest is continuous, with inflammable material spread uniformly over the land, and the fire extends in a direct line through it over the lands of several owners, even for a long distance, what intervening cause is there between the starting of the fire and the destruction of the last property burned? Why is not the destruction of the last piece of property the direct result of the defendant's negligence in starting the fire? Where a fire burns continuously, feeding upon materials of the same kind throughout its course, without any secondary or intervening cause, the last part burned is not the remote, but the natural and probable, result of the fire when first started, or, at least, it is within the power of a jury to so find. It was possible for the jury in this case to conclude that each link in the chain of cause and effect, from the setting of the fire to the destruction of the plaintiff's property was, according to common experience and the ordinary course of events, the reasonable and natural result to be anticipated. Each separate tree or heap of brush was not an intervening but a continuous cause, the same in principle, but not in degree, as if cordwood had been piled the entire distance. In that case would division in the ownership of the wood or of the land on which it stood divide responsibility? When fire is dropped at one end of a train of inflammable material, during a high wind and in a dry time, it is natural to expect that it will burn through to the other end unless interfered with in some way. That is the ordinary result and the one to be anticipated by a reasonable man. The wind and drought are not intervening causes, but are the conditions surrounding the one who sets the fire and are presumed to be in his mind when he contemplates the probable result of his act.

"The trial judge properly left it to the jury to find whether the destruction of the plaintiff's property was the natural and direct effect of negligence on the part of the defendants. It was for the jury to take into account all the circumstances, including the distance the fire ran before it reached her property, and decide whether it was the proximate cause of the injury. Mere distance has nothing to do with the question, except as it bears on the probability 'that no intelligent man could have apprehended injury as the result of the negligent act.' If the distance traversed by a fire is so great that the most remote part was not within the reasonable contemplation of the one who started it, the jury should be instructed accordingly, but in all ordinary cases it is for them to decide, under proper instructions from the court, whether the damages were the direct and natural result of the negligent act or not."

As the learned judge could find no error in the record that called for a reversal, he recorded his vote in favor of affirmance, and Parker, C. J., concurred with him.

RAILROADS—NEGLIGENCE—FIRE CAUSED BY SPARKS—DUTY TO PREVENT.—It is the duty of a railway corporation to supply itself with such engines as will be least liable to set fire, and be reasonably safe from destroying the property of others along its line. If a railroad company negligently permits combustible materials to accumulate on its track and right of way, and, setting fire thereto, negligently permits the fire to escape to adjoining lands and destroy the property of another, the company is answerable in damages, whether it started the fire negligently or not: *Watt v. Nevada Cent. R. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772, and note.

RAILROADS—LOSS FROM FIRES RUNNING ACROSS INTER-MEDIATE LANDS—LIABILITY—PROXIMATE AND REMOTE CAUSE.—A railroad company is answerable for injury to land by fire, caused by its negligence, although there is land, belonging to another owner, intermediate between the railroad and the plaintiff's land: *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214; *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Poeppers v. Missouri etc. Ry. Co.*, 67 Mo. 715, 29 Am. Rep. 518; and cases cited in the monographic note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 77, on the liability of railroad companies for fires. But it has been held in New York and Pennsylvania, in cases where fire has been communicated to the property of one person, and thence to the property of another, that the negligence of the company in setting out the first fire is too remote to enable the person whose property was destroyed by the second fire, to recover damages for the injury done to him: See note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 77; and monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 825, on proximate and remote cause, and in which the New York and Pennsylvania decisions on the subject are commented upon. Compare monographic note to *McNally v. Colwell*, 30 Am. St. Rep. 504. Whether an injury is or is not the natural and probable consequence of an act complained of is a question for the jury when the facts are undisputed: Note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 851.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

HAUG v. GREAT NORTHERN RAILWAY COMPANY.

[8 NORTH DAKOTA, 23.]

RAILROAD COMPANIES—LIABILITY FOR DEATH FROM WRONGFUL ACT—EXPOSURE OF INTOXICATED PASSENGER TO DANGER.—If a railroad company negligently carries a passenger, known by it to be in an imbecile and helpless condition from intoxication, past his station and to the next station, where he is put off the train, against his wishes, late, on a dangerously cold and stormy night, at a place where there is no accommodation for passengers, except a depot, from which he is ejected by the company's agent into the night, while quietly waiting for a train to take him back to his destination, whereby his death is caused by exposure to the storm, the company is liable to his widow for his death.

RAILROAD COMPANIES—DUTY IN EJECTING INTOXICATED PERSON.—If a railroad company discovers that a person, helpless from intoxication, is upon its train without right, it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. It must not expose him to great danger in thus ejecting him, and must take into consideration the climatic conditions and the propinquity of shelter.

DAMAGES—ALLEGATIONS AS TO, WHEN NOT NECESSARY.—In an action by a widow to recover damages for the wrongful killing of her husband, under a complaint showing that the deceased left surviving him a widow and minor children of tender years, no specific allegations showing that she or they suffered pecuniary damages by the loss of such life are required, in order to enable the plaintiff to recover.

B. C. Ingwaldson, for the appellant.

W. E. Dodge, for the respondent.

24 CORLISS, C. J. It is difficult to discover from the complaint or the plaintiff's brief the precise legal theory on which she seeks to sustain this action. Our first impression was against the sufficiency of the complaint, which has been thus far successfully attacked by demurrer. But on a more careful analysis of its averments, and after eliminating therefrom all immaterial allegations which tend only to obscure the question of liability, we are convinced that the plaintiff has disclosed a state of facts which establish such a breach of duty on the part of the defendant as renders it responsible to her in damages. The general theory of the action is that defendant's violation of its duty to plaintiff's husband was the cause of his death, and that therefore it is bound, under sections 5974-5976 of the Revised Codes, to make good to her the damage she has thereby suffered.

As the question arises on demurrer, we are concerned with nothing but the averments of the plaintiff's pleading. Do they state a cause of action? Stripped of all unnecessary verbiage, they are, in substance, as follows: That plaintiff is the widow of Jacob C. Haug; that he left him surviving the plaintiff and four minor children, who live with plaintiff; that the defendant is a railroad corporation; that on the second day of February, 1895, defendant received plaintiff's husband as a passenger for transportation from Hillsboro to Alton station, in this state; that it negligently carried him by his point of destination; that he was in an imbecile condition from drink, and was helplessly intoxicated, to the knowledge of the defendant and its employes; that on reaching the station next south of Alton, i. e., the village of Kelso, the defendant put him off its train, against his wishes; that it was then late in the night, and was stormy and dangerously cold; that at this village there were no proper accommodations for travelers except defendant's depot; that shortly after plaintiff had entered such depot and while he was quietly waiting for the next train to take him back to Alton, to the knowledge of defendant's agent, and while he was still in such imbecile condition from drink, and helplessly drunk, to the knowledge of such agent, such agent wantonly ejected him from the depot, and drove him out into the night; that it was dangerously and bitterly cold and stormy; that to compel a person, and especially one in his condition, to leave the waiting-room, was inhuman, and was to evidently and apparently endanger his life; that plaintiff, so denied all shelter, was forced to and did attempt to walk back toward Hillsboro,

the only place where he could find shelter, and ²⁵ that after hours of walking he finally succumbed to the cold, and died from exposure.

If these facts do not create a liability, it must be because the law deems human life cheap. In the forum of conscience, any human being would be instantly condemned who should treat a helpless drunkard as the deceased was treated by the defendant. The acts of defendant are none the less indefensible because they were performed, as all corporate acts must be performed, by agents. Does, then, the law lag so far behind ethics that conduct like this, which shocks the moral sense, is nevertheless sanctioned by legal principles? We are gratified to find that this question can be answered in the negative. The ground of liability in this case is the disregard by defendant of human life while in the performance of a legal right. When defendant negligently carried plaintiff past the station to which he was bound, it became liable to him for breach of its contract, and was under obligations to return him to that place without charge. But there is no connection between this negligent act and the death which thereafter resulted. Such act was not the proximate cause of his death. Had defendant carried him to a place of safety, and had he died from cold because of his intoxicated condition, no liability would have existed. Nor do we wish to be understood as holding that defendant was obliged to carry him without pay to any point to which he might express a desire to be transported. A traveler who buys a ticket at St. Paul for Minneapolis cannot, when negligently borne beyond his destination, demand that he shall be given a free ride to the Pacific coast. The railroad company has rendered itself liable for its breach of contract, but it has not incurred the obligation to carry the passenger any farther than it would be obliged to carry any other passenger who has no ticket and refuses to pay his fare. The duty to carry the traveler, who has been taken past his station through the negligence of the carrier, to a place where his life will not be imperiled, may perhaps be greater than the duty to a willful trespasser, who is conducting himself with violence on the train. But, in a general sense, his right to continued transportation is no greater. He must either pay or leave the train when a point has been reached where he will not be exposed to great hazard. Plaintiff in this case cannot complain of the mere fact of the ejection of her husband from the train at Kelso. It is because of the peculiar circumstances surrounding that act, and which made it one necessarily dan-

gerous to human life, when considered in the light of the subsequent conduct of defendant in forcibly removing him from its depot, that the plaintiff may justly hold defendant responsible for the terrible consequences which ensued. To have put him off the train where there were hotel accommodations would have been justifiable, because the defendant was not bound to carry him until he had become sober. Had he, after being ejected at such a place, been run over and killed in the street, or been frozen to death because ²⁶ of his state of intoxication, defendant could not be held responsible. But no one would contend that it could put him off from the train while in motion. And yet why is this so? The underlying principle applicable in such a case is that a railroad company must not, even when exercising the lawful right of removal, so act as to jeopardize human life. On the same principle, it could not set the passenger out in the midst of a storm on a cold night on the prairie or at a flag station. Neither would the law sanction its act in ejecting him under such circumstances at a station where there were no accommodations for travelers, and where the depot was closed. The defendant in this case owed to plaintiff's husband the duty of carrying him to a point where he, helpless from drink, would not be shelterless against the pitiless fury of a storm, on a bitterly cold night. Whether he was left on the lonely prairie between stations, or at a flag station where there was no depot, or at a village where he could not find shelter except at defendant's depot, which was closed to him or shelter in which was denied to him, the fact would in all the cases be the same—that it had placed him, a man helplessly intoxicated, to its knowledge, and whom it had negligently carried beyond his destination, in a position from which death or great bodily injury was almost certain to result. The defendant could not expect that a stranger in a place, much less one in such a state of intoxication, would be permitted to enter a private house. It was chargeable with knowledge that his condition was such that he might not even have sufficient control of his faculties to make an effort to do so. It was therefore bound when, despite his protests, it removed him at Kelso, to see to it that the station agent was apprised of the facts, and directed to allow him shelter in its depot until he could be carried back to the place where the defendant should, in the exercise of reasonable care, have originally left him. We do not mean to intimate that it is incumbent upon a railroad company to keep its passenger stations open at all hours of the day and night. And if, under ordinary

circumstances, the depot building is closed to the public except when it is necessary it should be open to accommodate the public, no one has any ground for complaint. Assuming that defendant has a right to close its depot as against the general public at the time plaintiff's husband was ejected therefrom, and assuming, further (but the complaint leaves this point in doubt), that what the defendant's agent did in removing her husband was only incidental to the act of closing the depot for the night, yet, as against him, the defendant had no right to close the depot. When its train reached Kelso with this helpless man on board, because of its own carelessness, it was bound, in view of the climatic conditions and the nonexistence of shelter at that point except in its own depot, to decide whether it would leave him there, in a place of safety, or carry him farther, to another place of safety, and, when once it determined to put him off at that point, there sprung up the obligation not to take from him the only shelter the ²⁷ place afforded. If this shelter was to be denied him, then it was inhuman to drop him at that station at all. It would be in no respect different from leaving him where the depot was already closed, or where there was no depot at all, or at a flag station, or between stations upon a shelterless plain. The wrongful act of the defendant would be in not guarding against the possibility that the station agent, ignorant of the facts, might close the depot, and thrust the unfortunate man, in his helpless condition, out into the dangerous storm. Defendant cannot escape liability because the conductor, without any thought of the dangers of the position of this helpless man, failed to apprise the station agent that the defendant, having carried him by his station, was bound to see that he was not placed in a situation of peril, and that, therefore, he (the agent) must give him shelter in the station. His intoxication was not the proximate cause of his death. It was, it is true, the cause of the defendant being required to exercise greater precaution as to the place of his removal from the train than if he had been sober. The man who voluntarily incapacitates himself by drink is not on this account an outlaw. The law deems his life as precious as that of an Emerson. When the carrier discovers that one helpless from intoxication is upon its train without right, it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. The law declares to the carrier that it shall not expose him to great peril even in exercising its undoubted right to eject him;

and, in declaring whether he will be subjected to peril, not only must climatic conditions, the propinquity of shelter, and other matters be taken into account, but also the actual state of his mind and bodily health and strength, if known to the agent of the carrier. Though the intoxication of the deceased did cast upon the defendant greater precaution in seeing to it that his life was not imperiled, yet it was not the cause of his death. That cause was the wanton act of the defendant's agent in unnecessarily exposing him, in a state of helpless intoxication, to the cold and storm of a bitter wintry night. The defendant has not even the excuse that it had no chance to prevent his taking passage on its train in this drunken state, for it is averred that his helpless and imbecile condition was known to the company at the time it accepted him as a passenger. There is ample authority for our decision that the facts alleged disclose liability.

In *Louisville etc. R. R. Co. v. Johnson*, 108 Ala. 62, it appeared that plaintiff's intestate, who was a passenger on one of its night trains, was very drunk, and refused to pay his fare. Thereupon he was ejected in a cut of the road where there was no escape, except up or down the track, along the sides of which there was room for a person to walk. The night was dark, and it was raining. At the south end there were cattle-guards, which could be passed only by walking on the track. Here he was struck, and killed by a train. ²⁸ It was held that the company was liable. The court said: "If a passenger on a train is intoxicated to a degree to render him unconscious of danger, or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of reckless and wanton negligence, rendering the company in whose employment he is, liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected, in a proper manner and at a proper place: *Tanner v. Louisville etc. R. R. Co.*, 60 Ala. 621; *Isbell v. New York etc. R. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78; *Kerwhaker v. Cleveland etc. R. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Johnson v. Chicago etc. R. R. Co.*, 58 Iowa, 348; *Kline v. Central Pac. R. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; 3 Wood's Railway Law, secs. 363, 364; *Shearman and Redfield on Negligence*, sec. 493; 2 Am. & Eng. Ency. of Law, 748." Again, the court said: "It is opposed to authority and reason, and the

common instincts of humanity, to allow, because a passenger is intoxicated, whether to a greater or lesser degree, and misbehaves in a manner authorizing the conductor to expel him from the train, that such expulsion may be made without the exercise of due care for the safety of the passenger, having reference to time, place, and surroundings. If expelled without the exercise of such reasonable care for his life and limb, and he is injured in consequence, the company will be liable, notwithstanding the fact if the passenger had not been drunk he would not have misbehaved, and if he had not misbehaved he would not have been expelled and injured. The right to make reparation rests upon the moral obligation resting upon everyone so to exercise his own rights as not to injure another. As was well expressed in *Isbell v. New York etc. R. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78: 'A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incidental to human affairs. Preventive remedies must, therefore, always be proportioned to the case in its peculiar circumstances, to the imminency of the danger, the evil to be avoided, and the means at hand for avoiding it.' " When this case was before the court on a former appeal (*Johnson v. Louisville etc. Ry. Co.*, 104 Ala. 241, 53 Am. St. Rep. 39), the court said: "There is another principle of law to be observed, which requires of all persons, in the exercise of a right or the performance of duty, that it be done with reasonable regard to the preservation of life, and prevention of great bodily harm, or the infliction of unnecessary injuries to others, and they will be held responsible for the manner in which the right is exercised or duty performed. It is an exceptional case where the law does not subordinate ²⁰ personal rights to the preservation of life. A conductor has the right, under proper circumstances, to eject a passenger from a car; but he would not be justified in exercising this right while the car was at a high rate of speed, or when upon a high trestle, nor would he be justified in putting off a person who was blind or deaf, knowing his infirmity, except at a safe place. Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place, and under conditions and

circumstances, which would expose him unnecessarily to great peril of life or bodily harm; and this, too, whether the danger arose from the natural infirmity of the person or was self-imposed. If the conductor did not know of the infirmity of the person and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor, under such circumstances, that constitutes the act culpable or willfully wrong. If the deceased was intoxicated to the degree that he was unconscious of danger—could not grasp his position and surroundings, and his duty to avoid danger from passing trains—or did not possess the power of locomotion, and the place where he was put off and left was dangerous to one in his condition, and these facts were known to the conductor, the conductor would be guilty of such negligence as to render the defendant liable for damages resulting from such misconduct, although the deceased may have been a trespasser on the train, and might have been legally ejected, in a proper manner and at a proper place.”

In Louisville etc. R. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186, it was held that the defendant was liable when it expelled from its cars, because he refused to pay his fare, a passenger who was helplessly drunk, the defendant knowing of his condition, he being expelled, not at a station, but in the snow. As a consequence of this expulsion at such a place, he was severely frozen, and the defendant was held liable therefor.

In Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601, the court said: “It might, perhaps, as far as this case is concerned be conceded that, if a man were so intoxicated as to be without reason, sense, or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the rails and go to sleep. We may concede further that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact. And, further, to put a man off in a dark night upon a high railroad bridge, or upon the brink of a precipice, where the first step would be destruction, this could find no justification in law. All this might possibly be.”

In Atchison etc. R. R. Co. v. Weber, 33 Kan. 543, 52 Am. Rep. 543, the court ³⁰ say, at page 554, of 33 Kansas: “The duty of the railroad company, however, with respect to Weber, did not

end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the case: "Of course, the carrier is not required to keep hospitals or nurses for sick or insane passengers, but, when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity toward him until some suitable provision may be made."

In *Conolly v. Crescent City R. R. Co.*, 41 La. Ann. 57, 17 Am. St. Rep. 389, the court said: "But none of those cases hold that this right of exclusion can be exercised inhumanly, or without due care and provision for the safety and well-being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized."

In *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387, the court, referring to some of the cases already cited, said: "These are cases—extreme ones, it may be—illustrating the doctrine that regard must be had to the helpless condition of one who enters a railroad train, and that those in charge of the train must do no act which is cruel or inhuman. Granting that these cases are extreme ones, still the general doctrine which they assert is undeniably a sound one, for through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another's helplessness."

In *Roseman v. Carolina etc. R. R. Co.*, 112 N. C. 709, 34 Am. St. Rep. 524, the court said: "But where the power expressly given by law is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting from the expulsion. Cases falling within this last exception to the general rule, and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel, or too much intoxicated to be trusted to find the way to the nearest house or station: 3 Wood's Railway Law, sec. 362; 2 Shearman and Redfield on Negligence, sec. 493; *Toledo etc. Ry. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277."

In *Brown v. Chicago etc. R. R. Co.*, 51 Iowa, 235, the court said: "In exercising the right of ejection, reasonable and ordi-

nary care should be employed. In determining whether such care has been exercised, all the circumstances should be considered—as the physical condition of the person ejected; the time, whether in daylight or late at night; the condition of the country, whether thickly or sparsely settled; the place of the ejection, whether near to or remote from dwellings of any character, including stations; the character of the weather, whether pleasant or inclement, etc. The rules of law, as well as the dictates of humanity, require that ³¹ the ejection shall occur at such place, and be prosecuted in such manner, as not unreasonably to expose the party to danger.”

Judge Elliott says, in his work on Railroads, section 1637: “If he is so intoxicated or so young or feeble as not to be able to take care of himself or look out for his own safety, the company should exercise reasonable care to see to it that he is not expelled and abandoned in such a place, and under such circumstances, that he will be exposed to unnecessary peril.”

All the cases which recognize the right of the carrier to eject the passenger who has no ticket, and refuses to pay his fare, assert that this right must be exercised in such a manner as not to imperil the life of the passenger, or subject him to danger of bodily injury. See, as supporting this principle, the following decisions, which are more or less in point: *Central R. R. Co. v. Glass*, 60 Ga. 441; *Railway Co. v. Gilbert*, 64 Tex. 536; *Lake Shore etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519; *Ham v. Delaware etc. Canal Co.*, 155 Pa. St. 548; *Rudy v. Rio Grande etc. Ry. Co.*, 8 Utah, 165; *Gill v. Rochester etc. R. R. Co.*, 37 Hun, 107; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Railroad Co. v. McDonald*, 2 Willson's Civ. Cas. Ct. App. 144; *Hall v. South Carolina Ry. Co.*, 28 S. C. 261; *Wyman v. Northern Pac. R. R. Co.*, 34 Minn. 210. See, also, *Weymire v. Wolfe*, 52 Iowa, 533; *Isbell v. New York etc. R. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78.

The complaint shows with sufficient clearness that the death which resulted was proximately caused by the defendant's wrongful act. The order sustaining the demurrer is reversed.

All concur.

ON REHEARING.

BARTHOLOMEW, C. J. There is one question involved in this case that was not disposed of in the original opinion. It was not mentioned in oral argument upon the first hearing, and, while it was briefly treated in respondent's brief, yet we over-

looked it, and hence, on respondent's petition, we ordered a re-argument.

It is urged that the complaint contains no specific allegations showing that this plaintiff or the heirs of Jacob C. Haug have suffered any pecuniary loss or damage by reason of his death, and that only actual pecuniary damages can be recovered in an action of this character, and that the law does not presume damages from the single fact of death; hence, unless the complaint contains specific averments of damages, it fails to state a cause of action. It will be noticed that the cause of action in this case, if any there be, accrued on February 3, 1895. The Compiled Laws of 1887 were then in force. The action was not commenced until 1897. The Revised Codes of 1895 were then in force. The cause of action here sought to be enforced was unknown to the common law, and hence must depend entirely upon statutory provisions, and the provisions giving this right of action, as set forth in section 5499 of the Compiled Laws, differ somewhat from the provisions giving ³² the right of action, as set forth in section 5974 of the Revised Codes. We are not prepared, however, to say that the rule of pleading would be different under the one statute or the other. But, if there be a difference in liability under the two statutes, then, clearly, under the provisions of section 5142 of the Revised Codes, this action must be regarded as brought under the provisions of section 5499 of the Compiled Laws, which was in force when the cause of action accrued. That section reads: "If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants, or employés, then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid." That was the modified form, in force in this jurisdiction, of Lord Campbell's act, passed in 1846, which first brought causes of action of this character into existence. Statutes based upon Lord Campbell's act are now in force in nearly or quite all of the states in this Union. This statute has been often before the courts, and this very question of pleading which we are now considering has been repeatedly passed upon. The question is new in this jurisdiction, and, when we consult the adjudged cases, we find them to be in some confusion, and perhaps some conflict. Difference in phraseology may account in

part for the diversity of opinion among judges, but we think there are cases that cannot be reconciled. Upon one point the cases are united, and that is that the only damages recoverable in this action are for the pecuniary loss. Nothing can be recovered for the loss of society or for damages in the way of solatium. But the cleavage in the authorities arises upon the question of the presumption of any pecuniary damages arising from the fact of death.

The first case in England wherein the point arose is *Chapman v. Rothwell, El., B. & E. 168*. In that case the declaration was filed by the husband, as administrator, to recover damages for the death of his wife. The allegations simply set forth the facts showing the negligence of defendant resulting in the injury and death of the wife, and added: "And the plaintiff, as administrator as aforesaid, claims two hundred pounds." There was a demurrer to the declaration. Lord Campbell, the author of the act giving the right of action, was then chief justice. Upon the argument of the demurrer the attorney for the defendant made the statement that "no pecuniary injury is shown to have accrued to the plaintiff." Lord Campbell replied: "The damages might be proved by evidence under this declaration." And Crompton, J., said: "Section 1 appears to contemplate giving damages whenever the party injured could have recovered them, whether nominal or more"; and the point was overruled. It may be that this ruling is to some extent weakened by the language of Baron Pollock in the subsequent case ³³ of *Duckworth v. Johnson, 4 Hurl. & N. 653*, where he says: "If there were no damages the action is not maintainable. It appears to me that it was intended by the act to give compensation for damages sustained, and not to enable persons to sue in respect to some imaginary damages, and so punish those who are guilty of negligence by making them pay costs." But this language is not necessarily at variance with the decision in *Chapman v. Rothwell, El., B. & E. 168*, and ought not to be held to establish a different rule of pleading. It would therefore seem that in England there need be no special allegations showing damages.

In an early case under the New York statute (*Safford v. Drew, 3 Duer, 627*), Justice Duer held that it was necessary, under the statute, to show the existence of parties who were entitled to the benefit of the action, and that such parties had suffered pecuniary loss, and said: "These facts are in their nature material and issuable, and in actions like the present one are, therefore, in my judgment, just as necessary to be proved upon the trial,

and, consequently, to be averred in the complaint, as the death of the person injured, and the wrongful act or neglect of defendant as the primary cause." If the able justice intended to say that the complaint must contain specific allegations as to the character of, and reasons for, the damage, then, as we shall see, the case has not been followed in New York. But in *Regan v. Chicago etc. Ry. Co.*, 51 Wis. 599, it was held that the complaint should allege facts showing that a present or prospective pecuniary loss or injury had resulted to the relatives in whose behalf the action was brought, and cited the case in 3 Duer in support of the position. The same rule of pleading under this statute has been adopted in Michigan: *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539. It should be noted in this case, however, that the action was brought to recover damages caused by the death of an infant less than two years of age. A general allegation of damage was held bad in *Charlebois v. Gogebic etc. R. R. Co.*, 91 Mich. 59, where the action was to recover damages for the death of an infant eight years of age. In Texas, also, it is held that the doctrine of nominal damages does not apply: *McGown v. International etc. Ry. Co.*, 85 Tex. 289. In that case it was sought to recover damages for the death of a wife. We do not understand the supreme court of Texas to hold that a general allegation of damages is insufficient as a matter of pleading. But it does hold that actual damages must be shown. It is perhaps proper, while the cases are not clear upon the subject, to place Nebraska among the states which require the damages to be specially pleaded: See *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; *Orgall v. Chicago etc. Ry. Co.*, 46 Neb. 4. And perhaps, also, South Dakota: *Belding v. Black Hills etc. Ry. Co.*, 3 S. Dak. 369.

On the other hand, very eminent courts have held that a general ³⁴ allegation of damages was sufficient, under these statutes; that special allegation of damages was not required; and that nominal damages might be recovered: *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 338; *Chicago etc. Ry. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Chicago v. Scholten*, 75 Ill. 468; *Gorham v. New York Cent. etc. Ry. Co.*, 23 Hun, 449; *Lehman v. Brooklyn*, 29 Barb. 234; *Ihl v. Forty-second Street etc. R. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Oldfield v. New York etc. R. R. Co.*, 14 N. Y. 310; *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543; *Johnston v. Cleveland etc. R. R. Co.*, 7 Ohio St. 337, 70 Am. Dec. 75; *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Serensen v. Northern*

Pac. R. R. Co., 45 Fed. Rep. 407; Kenney v. New York Cent. etc. R. R. Co., 49 Hun, 535; 2 N. Y. Supp. 512; Atrops v. Costello, 8 Wash. 149; Barnum v. Chicago etc. Ry. Co., 30 Minn. 461.

In *Korrady v. Lake Shore etc. Ry. Co.*, 131 Ind. 261, Chief Justice Elliot, speaking for the full bench, said: "The appellee's contention that the complaint is bad because it does not specifically show that actual damages were sustained by the widow and infant children of the appellant's intestate cannot prevail. Where a complaint charges a railroad company with wrongfully killing a person, shows that the person so killed was free from contributory fault, and that he left a widow and infant children surviving him, a cause of action is stated, although it is not directly alleged that the surviving kinsfolk sustained actual damages. The legal presumption is that infant children are entitled to the benefit of the father's services, and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children."

These citations are sufficient to show that the decided weight of authority is opposed to the rule requiring a specific allegation of damages in order to constitute a good complaint. It is true that some of the cases go upon the theory that, when the wrongful act of the defendant is once established as the proximate cause of the death, the statute then bases a cause of action upon such wrong, and will presume nominal damages. But the more general holding is to the effect that, the wrongful act being once established as the cause of death, the decedent being free from fault, the plaintiff may, under a general allegation of damages, recover all such damages, within the amount claimed, as are ordinarily and usually sustained, from the loss of such life, by those standing in the relation to the decedent sustained by those in whose interest the suit is brought. This holding, we think, violates no rule of code pleading. The defendant is always sufficiently advised as to what he must meet on the question of damages. Any facts or circumstances tending to reduce the pecuniary value of the life destroyed may always be shown. The case of *Atrops v. Costello*, 8 Wash. 149, well illustrates this principle.

There is a distinction noticed in some of the cases that we think is founded upon reason. When the party in whose interest the suit is brought sustained such relations to the deceased that he ³⁵ had the legal right to demand the services of the deceased, or to demand support and maintenance at the

hands of the deceased, then substantial pecuniary damages will be presumed; while if recovery is sought by a collateral relative, or one having no such legal claim, and who was not in fact dependent upon the deceased, the presumption of substantial damages may not be indulged. This is illustrated in *Chicago v. Scholten*, 75 Ill. 468; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Winnt v. International etc. Ry. Co.*, 74 Tex. 32.

In this case we make our holding no broader than the facts require. The complaint discloses that the deceased left a widow and minor children of tender years. There is a general allegation of damages, but no facts pleaded showing in what such damages consist. The wife and minor children were entitled by law to demand support and maintenance at the hands of the husband and father. When, by the wrongful act of the defendant, they are deprived of that husband and father, the law presumes pecuniary damages, and particular facts showing damages need not be pleaded.

Our judgment of reversal must stand.

All concur.

RAILROADS—EXPULSION OF PASSENGER.—If a conductor, knowing a passenger to be drunk and helpless, on his refusal to pay his fare, ejects him from the train between stations in the snow and intense cold, by reason whereof the passenger is severely frozen, the company is liable: *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186. But where, under similar circumstances, a passenger, expelled from a train near a dwelling-house not far from a station, dies from exposure, the company is not liable: *Roseman v. Carolina Cent. R. R. Co.*, 112 N. C. 709, 34 Am. St. Rep. 524; nor where an intoxicated passenger is rightfully ejected at night one mile from home, and is injured by another train: *Louisville etc. R. R. Co. v. Johnson*, 92 Ala. 204, 25 Am. St. Rep. 35; or killed. But this right to expel such passengers must be reasonably exercised, so as not to inflict wanton or unnecessary injury or needlessly place them in circumstances of great peril: *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

DAMAGES.—A GENERAL ALLEGATION of damage is sufficient in an action by a father to recover for the death of his minor son: *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. Rep. 340.

BEST v. MUIR.

[8 NORTH DAKOTA, 44.]

REPLEVIN—WAREHOUSE RECEIPTS.—If a mortgagor of wheat delivers it to an elevator, and turns over to a third person, in payment of a claim, general storage tickets for such wheat issued by the elevator company, the mortgagee cannot maintain an action of replevin against such third person for the mortgaged wheat, as he has neither actual nor constructive possession thereof. In such case, the holder of the storage tickets has no control over the identical wheat covered by the mortgage, nor over the mass with which it is mingled, and can only claim from the elevator company the delivery to him of the number of bushels of wheat named in such tickets, of the grade therein specified, without reference to the source from which the elevator company may obtain the grain for delivery.

Newman, Spaulding & Stambaugh, for the appellant.

Pollock & Scott, for the respondents.

45 CORLISS, C. J. Plaintiff is seeking to recover the possession of certain wheat, which he claims under a chattel mortgage. The mortgage was given to him by David Ballinger, who raised the grain. Ballinger had a contract with the defendant for the purchase from him of a quarter section of land in this state; and under the contract Ballinger took possession of the land, and raised **46** thereon the wheat in question. Assuming for the purposes of the disposition of this case that the plaintiff was entitled to the possession of the property at the time the action was commenced, still it is obvious, under the undisputed facts, that he is proceeding against the wrong party defendant. Replevin will not lie against one who has neither actual nor constructive possession of the property. It is true that the property need not be physically within the defendant's possession. It is sufficient if it is within his legal control, although it be actually held by another—as, for instance, when an agent holds property for his principal. But in the case at bar the defendant neither held the wheat itself, nor controlled the possession thereof. It was delivered by Ballinger to an elevator, and ordinary storage tickets were issued, obligating the warehouseman to deliver to the holder thereof, not the identical wheat, or even wheat from the same mass with which it was commingled, but only an equal amount of grain of the same grade, to be delivered out of any wheat which the warehouseman might have on hand at the time the holder of the ticket should demand performance of the contract. While the tickets themselves

were not introduced in evidence, one of the witnesses testified, without objection, as follows: "The tickets issued were storage tickets—general storage tickets, and not special bin tickets. On these tickets the company would deliver only wheat of the same grade. The wheat could not be identified." The defendant did not take the grain to the elevator, and never exercised any control thereover before it reached such elevator. If he has ever had any control over the possession of the grain, it has been solely by virtue of the tickets issued by the elevator company when the wheat was deposited. What control did those tickets give him over the wheat covered by plaintiff's mortgage? It is not enough that they entitled him to receive from the elevator company a number of bushels of grain equal to that deposited, and of the same grade. The plaintiff is seeking to recover possession of the property on which he held a mortgage, and he must show that defendant at least controls the possession thereof, or of a mass of grain with which the particular wheat has been mingled. If this mortgaged wheat had been placed in a particular bin, with other wheat, and the tickets issued entitled the defendant to take the wheat represented thereby from that particular mass, it might well be said that he had control over the grain mortgaged. But no such case is before us. We take judicial notice of the ordinary course of business in storing grain, and delivering the same upon storage tickets issued therefor. Unless it is stipulated in the contract that the identical grain shall be redelivered, or that grain from the particular mass with which it was mingled shall be redelivered, the warehouseman is at liberty to procure from any source the grain with which to make good his contract. The evidence in the case is explicit that the tickets were general storage tickets, and not special bin tickets, and that they did not bind the ⁴⁷ company to deliver the same grain, or grain from the mass with which that grain was mingled, but only the same kind of grain, of the same grade. What control, then, did defendant ever have over the mortgaged wheat which was delivered to the elevator? He could not go with his ticket to the elevator, and demand the identical grain, or insist that the wheat called for by his ticket be delivered to him from the particular mass with which that wheat was mingled. All he could claim was that he be given, from such source as might suit the convenience of the company, the number of bushels of wheat named in the tickets, of the grade therein specified. To say that one so situated with respect to mortgaged property has any control thereover is to con-

found all legal distinctions. Ballinger, when he directed that certain of the wheat tickets should be issued and delivered to defendant in discharge of his obligations to defendant, turned over to defendant the proceeds of mortgaged property; and it might be that in a proper suit in equity the plaintiff could follow into defendant's hands such proceeds, and subject them to the lien of his mortgage. But this is not such an action. It is an action at law to recover possession of the grain mortgaged, on the theory that defendant has the specific property under his control. If after six months' time the defendant can be said to have constructive possession of the mortgaged property, then his remotest assignee could likewise be said to be in possession thereof at the end of a dozen years. All that defendant did was to accept from Ballinger, in payment of a claim against him, the obligation of the elevator company to deliver to defendant a certain number of bushels of wheat, of a particular grade. There has never been a moment of time during which he has exercised any control over the wheat covered by the plaintiff's mortgage. The elevator company has had possession thereof, and plaintiff could have maintained replevin against it, had he been able to show that, at the time of the commencement of the suit against it, it still had possession of the identical grain, although mingled with other wheat in its warehouse. And, if such company has so dealt with the property that replevin will not lie, then it is liable for the conversion thereof, provided, of course, the plaintiff is entitled to the possession of the same. That point we do not decide in this case, as the decision thereof is unnecessary. Nor could we here settle it so as to bind a stranger to this suit. We merely assume plaintiff's right to the property, and yet decide that he is proceeding against the wrong party defendant, considering the nature of his action. Plaintiff has at no time evinced a desire to change this action by an amendment of his complaint into an action of a different character. On the contrary, his counsel assert, on the very threshold of their brief in this court, that it is an action of replevin, and nothing else. We have deemed it unnecessary to cite authorities, for the principles which govern this decision are among the very elements of the law.

The judgment of the district court is affirmed.

All concur.

ON REHEARING.

48 WALLIN, J. Upon the petition of plaintiff's counsel a rehearing was granted in this action, and the case was again

fully argued at the present term. Our views remain unchanged. In the opinion formulated by the late Chief Justice Corliss, this court said: "Assuming for the purposes of the disposition of this case that the plaintiff was entitled to the possession of the property at the time the action was commenced, still it is obvious under the undisputed facts, that he is proceeding against the wrong party defendant." This point, being in our opinion well taken, is necessarily decisive of the case. Upon the reargument, counsel urged that if it be held that the plaintiff cannot recover the grain itself, under the complaint, which is strictly a complaint in replevin, nevertheless, as counsel contend, the plaintiff should be allowed to recover the value of the grain, under the same complaint. Counsel strenuously contend for the liberal rules of construction which prevail in code pleading, and insist that, governed by such rules, the allegations of the complaint are broad enough to allow the plaintiff to recover either the wheat in specie, or its value in money. But it is clear to this court that the crucial question in this case is not one of pleading. The controlling facts as stated in the original opinion are not in dispute. The defendant at no time had actual possession of the grain covered by the plaintiff's mortgage, and long prior to the commencement of this action the defendant had disposed of the elevator tickets in question. But let us suppose that the complaint was sufficient as a complaint in conversion, and further suppose that plaintiff made demand for the wheat of defendant, and commenced this action, while the elevator tickets still belonged to the defendant and were in his possession. Under these suppositions, could plaintiff recover the value of the wheat? We think not. To recover in such an action, it is incumbent upon the plaintiff to show that the defendant at some time had the actual or the constructive possession of the property. Just here the plaintiff fails in his proof; and this, regardless of any defect in the complaint. The evidence conclusively shows that the defendant at no time had either the actual or the constructive possession or control of the specific grain covered by the plaintiff's mortgage. Defendant at one time had certain elevator tickets, but these would not have entitled the defendant to demand of the elevator company the wheat covered by the plaintiff's mortgage, or any specific wheat. While it is true that under chapter 130 of the Laws of 1887, as amended by section 1 of the Laws of 1889, an elevator receiving wheat for storage becomes a mere bailee of the wheat, yet the bailment is of such a peculiar character that the ele-

vator company can fully discharge its obligations to the ticket holder by a delivery of grain of the same kind, grade, and quantity as that delivered by the bailor. Section 9, chapter 130, of the Laws of 1887, declares that "nothing in this section shall be construed to mean the delivery of the identical grain specified in the receipt." It therefore clearly appears that ⁴⁹ the defendant, as a storage-ticket holder, did not have any constructive possession of the grain in question, or of any specific grain. Under such circumstances it is entirely clear that an action would not lie against the defendant for the value of the grain covered by plaintiff's mortgage.

In *Plano Mfg. Co. v. Jones*, 8 N. Dak. 315, it was held, on the authority of the principal case, that if a mortgagor of wheat places it in an elevator and receives the usual general storage tickets therefor, which he delivers to a third person as collateral security for a debt due from the former to the latter, the mortgagee cannot, after demand on such third person for the wheat and his refusal to comply with the demand, maintain an action against him for the conversion of the wheat. In such case, the storage tickets do not give the holder constructive possession of the mortgaged wheat, nor entitle him to demand or receive possession of any particular lot of wheat from the elevator company.

WAREHOUSE RECEIPTS.—THE INDORSEMENT and delivery of warehouse receipts transfer the legal title and the constructive possession of the property to the indorsee: *State Bank v. Warehouse*, 70 Conn. 76, 66 Am. St. Rep. 82.

HALE v. CAIRNS.

[8 NORTH DAKOTA, 145.]

CONFLICT OF LAWS—PLACE OF CONTRACT.—Where a building and loan association, incorporated and having its principal place of business in one state, loans money to a resident of another state, secured by a mortgage on his real property therein, who executes a promissory note, which stipulates that it is understood to be made with reference to the laws of the former state, such stipulation is valid, and the transaction cannot be declared usurious when it is not so by the laws of the state wherein the association was incorporated.

BUILDING AND LOAN ASSOCIATIONS.—Upon the insolvency of a building and loan association and its consequent inability to proceed as anticipated when the loan was made, the borrowing member becomes entitled to be credited with whatsoever he has actually paid as premium for the purpose of securing the loan, but not to payments made upon stock pledged to secure the payment of such premium.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENT—CREDIT OF DUES AND PREMIUM.—A borrowing member has no right, on the insolvency of the corporation, to be credited with

payments made by him on shares of stock pledged to secure the repayment of his loan, and the same rule applies to payments made by him on such shares when pledged to secure the premium agreed to be paid to enable him to secure his loan.

Cochrane & Corliss, for the appellant.

M. H. Brennan, for the respondent.

¹⁴⁹ BARTHOLOMEW, C. J. William D. Hale, the appellant, is the duly appointed receiver of the American Savings & Loan Association. As such he seeks to foreclose a mortgage given by Robert Cairns and Ella Cairns to said association. Robert Cairns died before the action was brought, and the defendants Mary and Robert Cairns are his heirs at law. The American Savings & Loan Association was a corporation organized and doing business under the laws of the state of Minnesota, with its home office at Minneapolis. The allegations of the complaint, aside from the allegations as to the insolvency of the association and the appointment of the receiver, are substantially the same as in the case of United States etc. Loan Co. v. Shain, 8 N. Dak. 136. The answer also raises the same issues as in that case. Following the decision in that case, we hold that the contract in this case must be governed by the laws of the state of Minnesota, and that said contract is not usurious.

Upon the question of the proper credits to be given to the defendants, this case differs materially from the Shain case, as the association has become insolvent, and is unable to mature the stock, and consequently unable to complete the contract on its part. In this case the loan was four hundred dollars, and the premium bid was four hundred dollars. The evidence of indebtedness took the form of a bond. Ella Cairns signed as one of the obligors. The bond was for eight hundred dollars, but only the sum of four hundred dollars drew interest, and that at the rate of six per cent. Eight shares of stock were assigned to the association as collateral security; the bond to be paid by the absolute surrender of such stock at maturity. The bond was payable on or before nine years from date. It is conceded, as we understand the record, that on December 19, 1888, Robert Cairns, deceased, subscribed for, and there were issued to ¹⁵⁰ him, ten shares of stock in said association. Subsequently two of said shares were surrendered, and they figure in no manner in this controversy, and we shall treat the matter as a subscription for eight shares. Upon these shares he con-

tracted to make monthly payments at the rate of sixty cents upon each share until the stock matures. Cairns did not apply for a loan until more than a year thereafter, and the loan was not actually made until March 8, 1890. All payments up to that time had been kept up. Consequently, there had been paid upon said eight shares, before the loan was made, the sum of sixty-seven dollars and twenty cents. From the time the loan was made until the insolvency of the association the stock payments were regularly made. This included all payments up to and including October, 1895. Hence he paid upon his stock, after the loan, the further sum of three hundred and twenty-one dollars and sixty cents; and of this amount one-half, or one hundred and sixty dollars and eighty cents, was paid upon stock held by the association as collateral security for the bonus or premium. The interest upon the loan of four hundred dollars was also paid monthly in advance, and amounted during said term to one hundred and thirty-four dollars. For what amount of the sums so paid should the respondents receive credit?

This question has received very different answers at the hands of different courts. It has never yet been answered by this court. It has been held that a proper and equitable adjustment, in cases where the association has become insolvent and unable to mature its stock, is to charge the borrowing member with the amount of money received, with legal interest thereon, and credit him with all that he has paid, "whether paid as fines, penalties, or dues": *Strauss v. Carolina etc. Assn.*, 117 N. C. 308, 53 Am. St. Rep. 585; *Thompson v. North Carolina etc. Assn.*, 120 N. C. 420; *Buist v. Bryan*, 44 S. C. 121, 51 Am. St. Rep. 787. See, also, *Rochester Sav. Bank v. Whitmore*, 25 N. Y. App. Div. 491; 49 N. Y. Supp. 862. In this case the question was presented in an involved form, and just what the court decided is not clear. Respondent also cites in this connection *Randall v. National etc. Protective Union*, 42 Neb. 809. But in that case the association involved was, so far as the record discloses, an entirely solvent corporation; and under such circumstances there can be no injustice in crediting a borrowing member, who chooses to surrender the stock pledged, with all that he has paid thereon. This rule has been frequently applied in Pennsylvania: *Spring Garden Assn. v. Tradesman's Loan Assn.*, 46 Pa. St. 493; *Watkins v. Workingmen's etc. Assn.*, 97 Pa. St. 514. But that a different rule, as to credits to be given, should be applied in solvent and insolvent corporations, is, we think, entirely clear. The rule is universal that when a

corporation becomes insolvent there must be, or at least there may be, a loss to the stockholder. And, from their very nature, the certainty of loss in case of an insolvent building and loan association is greater than in many other forms of investment. They deal only with their members. Their capital consists exclusively of sums paid by their members. They cannot become insolvent in fact without an impairment of that capital, and, if there be an impairment, then the full amount of capital paid in cannot ¹⁵¹ be returned. That being true, every principle of their organization requires that every dollar of capital that has been paid in upon stock subscriptions should bear its proportionate share of the loss. In Endlich on Building Associations, section 514, it is said: "The truth is, that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements, and all rules and by-laws, must be read, and to which they must be conformed; and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared—that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted upon a basis of strict mutuality, equality, and fairness." It is evident that if, in cases of the insolvency of the association, all the borrowing stockholders are to be credited on their indebtedness with all the capital they have paid in, they suffer none of the impairment, and ultimately the entire loss must be borne by the nonborrowing members, and thus the basis of strict mutuality of burdens is entirely disregarded. Equity cannot, therefore, under such circumstances extend to the debtor credit for all he has paid upon his stock. This we think is the rule of the authorities, as well as of reason: *Eversmann v. Schmitt*, 53 Ohio St. 174, 53 Am. St. Rep. 632; *Wholford v. Citizens' Assn.*, 140 Ind. 662; *Weir v. Granite State etc. Assn.*, 56 N. J. Eq. 234; *Moran v. Gray* (N. J. Eq., Nov. 1, 1897), 38 Atl. Rep. 668; *Curtis v. Granite State etc. Assn.*, 69 Conn. 6, 61 Am. St. Rep. 17; *Strohen v. Franklin Sav. etc. Assn.*, 115 Pa. St. 273; *Post v. Building etc. Assn.*, 97 Tenn. 408.

But, viewing respondents in the light of borrowers only, and turning to the contract, we learn that, for the privilege of receiving the loan, respondents agreed to pay a premium of an amount equal to the cash received. That agreement was made by reason of the inducements held out by appellant, to the effect that both loan and premium could ultimately be paid by a sur-

render and cancellation of the stock when it reached par, and that the stock could be brought to that condition by small payments thereon at stated intervals, together with the profits that would accrue to such stock through the operations of the association. But the association, by reason of its insolvency, is unable to carry out its contract. It cannot mature the stock. The inducement which caused the respondent to offer the large premium has failed. Hence, whatever has been paid upon such premium, if anything, should be credited to respondents. This we think is the better rule, and it is amply sustained by the authorities last cited, although some courts have undertaken to apportion the premium, and treat a portion of it as earned: See *Towle v. American Bldg. etc. Soc.*, 61 Fed. Rep. 446; *Sullivan v. Stucky*, 86 Fed. Rep. 491. But, under what we regard as the better rule, respondents claim that they should be credited with the dues paid upon the shares of stock that were assigned as collateral to the payment of the premium. (It will be remembered that the premium was included in the bond, but drew no interest.) We ¹⁵² held in the *Shain* case—and the authorities fully sustain the proposition—that payments made upon stock that was pledged as collateral security for the payment of the loan did not constitute payments upon the loan. This was held upon the theory that the purchase of the stock and the borrowing of the money were distinct and separate transactions. The stock was purchased as an investment, and for the profits which it promised, and these profits inure to the benefit of the purchaser alike whether the stock be pledged or unpledged: *Goodrich v. City Loan etc. Assn.*, 54 Ga. 98. True, in the ultimate adjustment it was the intention to exchange the stock for the bond. But, in the language of the New Jersey court of errors and appeals in *State v. Hornbacker*, 42 N. J. L. 635, “until so exchanged, they are distinct in legal contemplation, as well as in form. The stock is a collateral security for, and not a credit on, the bond.” No reason, in law or logic, presents itself to us why the same rule must not apply to payments made upon stock that is pledged to secure the payment of the premium. Such payments on stock are not payments upon the premium. Hence in this case nothing has been paid upon the premium bid, and there is therefore nothing in that behalf with which to credit respondents. It will be noticed that in this case appellant is not seeking to recover any of the premium. He asks only the payment of the cash advanced, with certain interest thereon, and taxes paid. The association having become insolvent, and having

been in the hands of a receiver, it becomes the duty of that officer to proceed to collect the assets of the association. It is his duty to close the business out. The expectations of both parties have been disappointed. The contract is at an end. The interest upon this loan was paid, under the terms of the contract, to November 8, 1895. The appellant is entitled to recover the original loan, with the legal rate of interest in Minnesota, which is seven per cent, from said November 8, 1895. Should respondents pay this amount, or should it be realized upon a sale of the mortgaged property, respondents will, of course, become the absolute owners of the shares of stock which were assigned as collateral security, and will be entitled to a re-assignment thereof. There is a claim made for taxes for the sum of eighteen dollars and eighty cents, which the court found were paid by plaintiff, and which should also be included in the judgment.

The trial court will set aside its judgment heretofore entered in this case, and enter judgment against the respondent Ella Cairns for the amount heretofore indicated, with the usual decree of foreclosure as to all the respondents. It is so ordered.

Reversed.

All concur.

IN THE CASE of United States etc. Loan Co. v. Shain, 8 N. Dak. 136, an action was brought to foreclose a mortgage on real estate situate in North Dakota. The complaint showed that the plaintiff had been incorporated as a building and loan association under the laws of the state of Minnesota; that it made a loan to the defendant in February, 1889, of the sum of fifteen hundred dollars, he agreeing to take thirty shares of stock of the plaintiff company and to continue further payments thereon until the stock should mature, or the loan be paid, and to pay all fines and assessments against the stock and also a premium of fifty per cent of such thirty shares, and to assign them as security for the loan; that the defendant executed to the plaintiff a promissory note dated at St. Paul, Minnesota, declaring on its face that it was understood to be made with reference to the laws of that state. The defendant claimed that the transaction was governed by the laws of the state of North Dakota and of the territory of Dakota, and, if so, was usurious. Upon this subject the court said: "The appellant contends that the transaction in question must be governed by and decided under the laws of Minnesota. Respondent insists that the laws of Dakota territory and North Dakota must control. The solution of this question, under the authorities, is perfectly clear. This was, in its essence, a money loaning transaction. By it Sanford A. Shain borrowed fifteen hundred dollars from appellant. The parties were residents of different states. It was entirely competent for them to contract under the laws of either. They expressly agreed, both in the note and mortgage, that they contracted under the laws of Minnesota, the state of which appellant was a resident. That agreement is binding: *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Security*

Co. v. McLaughlin, 87 Ga. 1; Dugan v. Lewis, 79 Tex. 246, 23 Am. St. Rep. 332; Lanier v. Trust Co., 64 Ark. 39; Caesar v. Capell, 83 Fed. Rep. 403; Scudder v. Bank, 91 U. S. 406; Bigelow v. Burnham, 83 Iowa, 120, 32 Am. St. Rep. 294; Smith v. Parsons, 55 Minn. 520; Andrews v. Pond, 13 Pet. 77; Watson v. Lane, 52 N. J. L. 550. The fact that the loan is made on real estate does not change this rule: Trust Co. v. Burton, 74 Wis. 329; Bennett v. Association, 177 Pa. St. 233, 55 Am. St. Rep. 723; Association v. Vance, 49 S. C. 402; Association v. Hoffman, 50 S. C. 303. The note and mortgage in this case were made payable in Minnesota. Many cases hold that such fact alone would make the contract a Minnesota contract, in the absence of contrary stipulations. As early as Newman v. Kershaw, 10 Wis. 333, it was said: 'The general rule that contracts are to be governed by the law of the place of performance is too well settled to require the citation of authorities.' Again, it is conceded that, if appellant be in fact a building and loan association, this contract would not be usurious under the laws of this jurisdiction. Not that our laws as to building associations differed materially from those of Minnesota, but our laws applied only to domestic corporations, and hence appellant could not claim any protection from them, and this contract, if a Dakota contract, would, it is claimed, be usurious. Conceding this to be true, and even were the contract silent as to which forum should govern, yet, the parties being residents of different states, the law would presume that they contracted with reference to the laws of that state where the contract would be valid and enforceable": Wharton on Conflict of Laws, sec. 429; Bigelow v. Burnham, 90 Iowa, 300, 48 Am. St. Rep. 442; Bell v. Packard, 69 Me. 105, 31 Am. Rep. 251; Pritchard v. Norton, 106 U. S. 124. Under any view that presents itself, this contract must be construed according to the laws of Minnesota.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY OF.—Upon the dissolution of a building and loan association by the appointment of a receiver, members indebted to it who have paid the dues upon their stock are not entitled to be credited the amount of such payments in reduction of their indebtedness: Curtis v. Granite etc. Assn., 69 Conn. 6, 61 Am. St. Rep. 17, and see monographic note thereto, 25-30. A member who has borrowed money of, and executed a mortgage to, a building and loan association is, upon its going into the hands of a receiver, entitled to be credited upon his mortgage with all amounts paid as interest and all dues on his shares of stock: Buist v. Bryan, 44 S. C. 121, 51 Am. St. Rep. 787.

STATE v. KOERNER.

[8 NORTH DAKOTA, 292.]

CRIMINAL LAW—INTOXICATION AS DEFENSE.—Under a statute providing that "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act," a person accused and on trial for larceny is entitled to offer evidence to show his intoxicated condition at the time of the commission of the crime as bearing upon the existence of the element of intent.

CRIMINAL LAW—EVIDENCE OF INTOXICATION—INTOXICATION AS DEFENSE.—If an offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, voluntary intoxication, as affecting the mental state of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent. In such cases, evidence of intoxication at the time when the crime was committed is admissible solely for the purpose of determining whether, in fact, the species or degree of crime charged has been committed by the accused and can never be considered by the jury to justify or excuse a crime which has in fact been committed.

A. T. Cole, for the appellant.

F. B. Morrill, for the respondent.

293 YOUNG, J. The defendant was tried and convicted of the crime of grand larceny in the district court of Cass county at the November, 1898, term. Thereafter a motion for a new trial was made on his behalf. This was denied, and on December 6, 1898, he was sentenced to one year in the state penitentiary.

This appeal is based entirely upon errors of law. While the specifications of error are several in number, we need not treat them separately in this opinion; for they are either rendered unimportant, or are determined, by the conclusion which we have reached as to the one error of the trial court in entirely excluding all evidence offered by the defendant to show his intoxicated condition at the time of the alleged offense. At the close of the state's case this offer of testimony was made: "The defendant now offers, as his defense in this action, to show by competent witnesses that he had been under the influence of intoxicating liquors for a number of days just prior to the commission of the alleged offense, and was at that time, and had been so at the time, and was at that time in a condition not to know what he was doing, or to have control of his will, and that he was incapable of forming or executing an intent to commit any crime whatsoever, by reason of his condition at that time from intoxication, and from his general condition from the effects of previous intoxication." This offer was rejected by the court, upon objection of the state's attorney, made on the ground that, "under the laws of this state, intoxication is no excuse for the commission of a crime, under section 6815 of the Revised Codes." It appears elsewhere in the record that defendant's intoxicated condition had extended over a period of not more than six days. It was plainly a case of voluntary intoxication, and not insanity resulting from long-continued and excessive indulgence in intox-

icating liquors, which is a condition always distinguishable from voluntary intoxication. The court's refusal to receive this testimony is assigned as error. The manner of the offer of testimony by the defendant is treated by counsel for the state as sufficient, and it will be so considered, without expressing an opinion upon that point. We feel that we should also disregard the language of the offer, so far as it appears to restrict it to the one purpose of showing incapacity to form an intent, and treat it, as counsel for the state has done, both in his oral argument and brief, as presenting for our determination the ²⁰⁴ broader question whether, in a larceny case, the defendant has a right to offer evidence to show his intoxicated condition at the time of the commission of the acts, as bearing upon the existence of the element of intent. If such evidence is admissible for that purpose, to aid in establishing a defense to the crime charged, it should not have been excluded because counsel, in his offer, inadvertently indicated as its purpose a result which may be in excess of the legal effect of the evidence proposed to be introduced.

The legislature of this state has by express enactment declared when and for what purpose the intoxicated condition of one on trial for the commission of a crime may be interposed as a defense, and considered by the jury. Section 6815 of the Revised Codes reads as follows: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." The first portion of the section just quoted, which in effect declares that acts which are criminal when done by a sober person are just as criminal when done by one in a state of voluntary intoxication, is merely the adoption by the legislature of the uniform doctrine of the courts that voluntary intoxication is never a justification or excuse for the commission of a crime. It is evident, then, that if the defendant did in fact commit the crime with which he was charged, his intoxicated condition would not avail, either to justify or excuse him. This his counsel very properly concedes. But it is urged that the crime was not committed, that the larceny was not complete without the intent, and that the testimony offered should have been received,

and submitted to the jury, to be weighed by them in determining whether or not the necessary intent existed. The statute does not make evidence of intoxication generally admissible and for all purposes. The language used plainly indicates that the legislature had in mind distinct classes of crimes, and intended to limit the admission of such evidence thereto, and for the purpose expressed, namely, to those crimes whose species or degree depend upon the existence of a particular purpose, motive, or intent as an essential element thereof, and for the purpose of determining the intent with which the acts were committed. The admissibility of the evidence of defendant's intoxication in this case depends, then, entirely upon whether larceny comes within this classification. Homicide plainly does. In such a case evidence of intoxication is admitted, never to excuse the homicide, but to assist the jury in finding the presence or absence of the particular intent which marks the particular degree. Likewise in burglary it is admissible, not to justify the acts of breaking and entering, but to throw light upon the additional element, the intent to commit some other crime, which is the particular element necessary ²⁰⁵ to constitute this species of crime. In neither case, nor in any case within the classification made by the statute, is the evidence either admitted or considered for the purpose of justifying or excusing the crime, but for the sole purpose of determining whether, in fact, the particular species or degree of crime has been committed.

Are the elements of larceny such as to bring it also within the class of crime permitting the consideration of evidence of intoxication for the purpose of determining the intent with which the acts are committed? Our answer must be in the affirmative, and our conclusion is that the exclusion of the evidence of defendant's intoxicated condition by the trial court, when considered as offered as a defense to the crime with which he was charged, was error. In reaching this result, the fact that larceny, is divided into degrees has no weight, for its degrees depend wholly upon the value of the property taken. Our conclusion that it is included is based upon the statutory definition of larceny, which makes the intent to deprive another of the property taken a particular and essential element to constitute the crime, without which it does not exist, as well as upon the uniform classification of larceny, by text-writers and courts, as a crime requiring a specific or particular intent: 1 Wharton's Criminal Law, secs. 51-53, 883; 1 McClain's Criminal Law, sec. 161; Bishop's Criminal Law, 4th ed., sec. 490; Mason v. State, 32

Ark. 238. In *State v. Welch*, 21 Minn. 26, the court said: "In a prosecution for larceny, the act of the prisoner, the mere taking, does not constitute the offense, but the act coupled with the intent to steal; and the question is not, Did the prisoner intend to take the goods? but, Did he take them *animo furendi*?" In *People v. Walker*, 38 Mich. 156, a larceny case, the verdict was set aside for error in charging the jury as follows: "Even if the jury should believe that the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the alleged offense, it is no excuse for him, and they should not take it into consideration. A man who voluntarily puts himself in condition to have no control of his actions must be held to intend the consequences." Cooley, J., said: "This charge was given in reliance upon the general principle that drunkenness is no excuse for crime. While it is true that drunkenness cannot excuse crime, it is equally true that, when a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. In larceny, the crime does not consist in the wrongful taking of the property, for that might be a mere trespass, but it consists in the wrongful taking with felonious intent; and if the defendant, for any reason whatever, indulged no such intent, the crime has not been committed." In *Chatham v. State*, 92 Ala. 47, another larceny case, the court said: "When the offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, drunkenness, as affecting the mental state of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent." *Wood v. State*, 34 ²⁹⁶ Ark. 341, 36 Am. Rep. 13, also a larceny case, is in full accord with the cases just cited: See, also, *State v. Bell*, 29 Iowa, 318; *State v. Schingen*, 20 Wis. 79 (*74). See, also, *Pigman v. State*, 14 Ohio, 555, 45 Am. Dec. 558; *Lytle v. State*, 31 Ohio St. 196. The only state, so far as we can ascertain, which has excluded the evidence of a defendant's intoxication in larceny cases, is Indiana. *O'Herrin v. State*, 14 Ind. 420, and *Dawson v. State*, 16 Ind. 429, 79 Am. Dec. 439, are against the admission of such evidence. The later case of *Bailey v. State*, 26 Ind. 422, however, held such evidence competent, as tending to show whether the defendant was in a mental condition so as to be able to commit the crime. And still later, in *Rogers v. State*, 33 Ind. 543, that court reversed the lower court for refusing to admit evidence to show that the defendant, who was addicted to the use of opium, had at the

time of the offense been deprived of his accustomed supply of the drug, upon the ground that the evidence went to show his mental condition, and bore upon the existence of the intent. This case is cited by *Chatham v. State*, 92 Ala. 47, in support of the admissibility of evidence of intoxication in larceny cases. In the latter case the court said: "When the offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent. . . . The decided weight of authority sustains the doctrine that evidence of the condition of the accused, though caused by voluntary drunkenness, is receivable, and may be considered by the jury in determining the question of intent." If the property taken is not taken with the intent to deprive another thereof, the crime of larceny has not been committed, and the existence of this intent is always for the jury to determine. There is no degree of intoxication, however great, which, of itself, is recognized as rendering one legally incapable of forming a criminal intent. But there may be a mental condition amounting to a species of insanity, superinduced by long and excessive use of intoxicating liquors, which amounts to a legal incapacity to commit crime. In such a case, the jury passes upon the existence of that condition, and, if the condition exists wherein the accused is legally irresponsible, the law holds him guiltless of crime.

From an application of a familiar principle that every person is presumed to intend to do that which he does do, and also to intend the natural consequences of his acts, juries very naturally and usually do infer, from the acts entering into the crime of larceny and the manner of their commission, the intent to deprive another of the property taken; but this is by no means a necessary inference, for the intent accompanying the acts may be entirely wanting, or in itself an innocent one. For instance, the property may be taken with an intent to return it, or be taken by mistake, or some intent other than to deprive the owner thereof, in which case larceny has not, of course, been committed. The intent to steal does not follow the ²⁹⁷ act of taking as a legal and conclusive presumption; and we may add that the act of the legislature, in admitting this class of evidence in particular cases where intent is peculiarly the gist of the crime or degree, is not an arbitrary exercise of power, for it rests on the underlying principle that the ultimate object of

judicial inquiry in every criminal prosecution is to determine whether a crime has been committed, and to ascertain the guilt or innocence of the accused. And it would seem to us equally justifiable in principle to prohibit a jury from considering evidence of a defendant's physical condition, where it amounted to partial or complete paralysis of his physical powers, and is offered as bearing upon the question whether the physical acts included in the crime were committed, as to exclude from their consideration his intoxicated condition, as bearing upon the existence in his mind of the intent to steal, in view of the fact that the well-known effect of intoxication upon the mind is to impair the normal condition of the mental machinery in varying degrees, and to produce, in some cases of long-continued and excessive use of intoxicating liquors, such a condition of mind as to amount to legal incapacity. The admission of evidence of intoxication in the cases coming within the statute is solely for the purpose of determining whether, in fact, the species or degree of crime charged has been committed, and should always be so restricted by proper instructions, and never be considered by the jury to justify or excuse crimes which have been committed. For the reasons stated, the order of the district court is reversed, and a new trial granted.

All concur.

CRIMINAL LAW. — VOLUNTARY INTOXICATION may be shown in defense where a person is accused of a crime which can be committed only by doing a particular thing with a specific intent: *Chrisman v. State*, 54 Ark. 283, 26 Am. St. Rep. 44; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232. On a trial for theft, it is competent for the accused to prove that at the time of the commission of the offense he was so drunk as to be incapable of forming an intent to steal: *Loza v. State*, 1 Tex. App. 488, 28 Am. Rep. 416; and one wrongfully taking the property of another when too drunk to entertain a criminal intent cannot be convicted of larceny: *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13; note to *Reagan v. State*, 19 Am. St. Rep. 837. Compare *Dawson v. State*, 16 Ind. 428, 79 Am. Dec. 439. The general rule is, that drunkenness is no excuse for crime: *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415; *Evers v. State*, 31 Tex. Cr. Rep. 318, 37 Am. St. Rep. 811; *Springfield v. State*, 96 Ala. 81, 38 Am. St. Rep. 85.

STATE v. HOGAN.

[8 NORTH DAKOTA, 301.]

INSURANCE—AGENT, ACTING AS—WHEN CRIMINAL.— If a statute provides that any agent who acts for an insurance company in transacting the business of insurance without procuring a certificate of authority as therein specified shall be punished by a fine, a violation of such statute constitutes a crime amounting to a misdemeanor.

INSURANCE—WHAT CONSTITUTES—REVENUE FROM LAND.— A corporation undertaking to guarantee a fixed revenue per acre from farming land, and which contracts, for a specified consideration, to pay such fixed amount per acre for the crop grown upon such land, without regard to its value, is an insurance company.

W. E. Purcell, P. J. McCumber, C. E. Wolfe, and Stevens & Allen, for the petitioner.

J. F. Cowan, attorney general, and G. W. Soliday, state's attorney, for the state.

³⁰¹ BARTHOLOMEW, C. J. One C. N. Hogan presented to this court his petition for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by the sheriff of Foster county, in this state. His petition sets forth that he was arrested upon a warrant issued by a justice of the peace of said county, which said warrant was based upon a complaint duly laid before said justice by one Ferguson, wherein said petitioner was accused of having acted as agent for an insurance company without having procured the certificate required by section 3124 of the Revised Codes of this state, that a preliminary hearing was duly had before said justice, and that upon such hearing said justice adjudged that the petitioner be held to answer to said charge before the district court of said county, and fixed his appearance bond at the sum of five hundred dollars, which the petitioner failed to give, whereupon he was duly committed to the custody of said sheriff, and was by him restrained. Copies of the complaint, the warrant, of all the testimony introduced at the hearing, of the entries in the docket of the justice and of the mittimus were attached to, and made a part of, the petition. The writ was duly issued by this court, directed to said sheriff, who ³⁰² in due time made return thereto setting forth the grounds upon which he restrained the petitioner, which were substantially in all respects as shown in the petition. To this return the petitioner demurred, and upon the issues of law thus raised the case was argued to this court.

The petitioner contends: 1. That a violation of the provisions of said section 3124 does not constitute a crime, under the laws of this state; and 2. Granting that such violation does constitute a crime, there is no reasonable or probable cause to believe that petitioner has committed such crime. We notice the points in this order.

Section 3124 of the Revised Codes declares: "No agent shall act for any insurance company directly or indirectly in taking risks or transacting business of insurance without procuring from the commissioner of insurance a certificate of authority, stating that such corporation or company has complied with all the requisites of this chapter." Section 3131, being a part of the same chapter, declares: "For violation of any provision of this chapter when no penalty is specifically provided for herein the offender shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars." We notice here that the fine imposed is declared to be by way of punishment, and a large discretion is vested in the court in fixing the amount. No part of the amount inures to the benefit of any private person. No person is authorized to sue for or recover it. It is not a case where the law arbitrarily fixes a penalty as the liquidated damages for failure to perform an ascertained legal duty owing to another, and which penalty the party to whom the duty was owing may recover in a personal action upon proof of the dereliction. But petitioner urges that this penalty should be recovered by the state under the provisions of chapter 27 of the Code of Civil Procedure, which relates to actions to recover penalties and forfeitures. But the first section of that chapter (section 5785) provides that, if the act for which the forfeiture was imposed is a misdemeanor, then such forfeiture cannot be recovered in a civil action. We look then to the Penal Code to determine whether or not this act is a misdemeanor. Section 6802 reads: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments." And the third punishment named is "fine." We have then, in this case, a statute (section 3124) forbidding the doing of a certain act, we have that forbidden act done, and the punishment which the law (section 3131) prescribes for doing this forbidden act is a fine; hence it must be a crime. Section 6803 declares that crimes are divided into felonies and misdemeanors. Section 6804 reads: "A felony is a crime which is or may be punishable with death or imprison-

ment in the penitentiary; every other crime is a misdemeanor." We have here, then, a crime. It cannot be punished by death or imprisonment; hence it must be a misdemeanor. It seems clear to us that petitioner's first contention cannot prevail. In saying that this offense cannot be ³⁰³ punished by imprisonment, we mean only that primarily the judgment must be a fine, and the judgment may be satisfied by the payment of the fine; but we do not hold that the judgment may not also direct that, in case of nonpayment, the defendant be imprisoned as provided in section 8295 of the Revised Codes.

Petitioner's second proposition presents more difficulties, and, as preparatory to its discussion, we remark that no point is made by petitioner as to the regularity of any of the proceedings that led up to his incarceration. They are concededly regular. It is admitted, also, that petitioner was soliciting business as agent for a corporation known as the Realty Revenue Guaranty Company, of Minneapolis, Minnesota. It is admitted that petitioner never procured the certificate of authority specified in said section 3124, and that he took an application from the complaining witness in form as set forth in the evidence, and procured for said witness the contract of said company as set out in the evidence, and took the promissory note of the witness, secured by chattel mortgage, for the consideration mentioned in said contract. These admissions leave but one question for our determination: Is or is not the Realty Revenue Guaranty Company, in fact or in effect, an insurance company? If it be, then clearly the petitioner was properly held; otherwise, he should be discharged. While the attorneys representing the state claim that the oral evidence in the record strengthens their claim that said corporation is in fact an insurance company, yet we shall rest our conclusions on this point upon the documentary evidence. Our statute (Rev. Codes, sec. 4441), defines insurance as follows: "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." Necessarily, in defining insurance in a single sentence, only the most general terms can be used, and any general definition must be extended to cover the ever-changing phases in which the subject is presented to the public. Fifty years ago it was thought that a single chapter in any work on contracts could exhaust the law of insurance. Now Mr. Joyce presents the subject in four elaborate volumes, showing the immense development of that branch of the law. Mr. Joyce expressly defines one line of insurance as guaranty

insurance: See 1 Joyce on Insurance, secs. 12, 13. True, guaranty insurance, as there defined, relates more particularly to guaranty against loss by reason of breaches of contract, such as "fidelity guaranty" and "credit guaranty." But we have real estate title guaranty insurance; and, while, perhaps, this is the first instance where an attempt has been made to guarantee a realty revenue, yet as the revenue arising from that class of realty here involved, i. e., farming lands, is affected by so many contingencies, such as winds, hail, frost, drought, ravages of insects, etc.—contingencies which, while not likely to happen, yet such as may occur—it would seem that inherently it would be a proper subject for insurance, perhaps even an inviting field. In this record we find a copy of the articles of incorporation of the Realty Revenue Guaranty Company. The ³⁰⁴second article sets forth the general business of the corporation, naming a number of things that it is organized for the purpose of doing, and, among others, "to guarantee certain rental and produce income from lands and tenements." The petitioner, as agent for said company, took from Peter Ferguson an application for a contract. The application was upon a printed form, headed, in bold type, "Realty Revenue Guaranty Company, of Minneapolis, Minn. Capital stock, \$100,000." Then follows the printed portion, which reads: "I, ———, of ——— P. O., county of ———, state of ———, do hereby apply to the Realty Revenue Guaranty Company for an option-sale contract of \$——— per acre, which is hereby referred to and made a part hereof, subject to all conditions therein contained upon all crops raised on the following described lands." Then follows a description of land, and various questions to be answered by the applicant as to whether he is owner or tenant of the land, and what interest he has in the crop, what the land yielded per acre the year before, nature of the soil, etc.—all to be signed by the applicant. Upon this application, Ferguson received a contract, which we copy in full: "This agreement, made by and between the Realty Revenue Guaranty Company, of Minneapolis, Minnesota, and Peter Ferguson, of Carrington P. O., County of Foster, and State of North Dakota, party of the second part, witnesseth that, in consideration of an application for this contract, which is hereby referred to and made a part hereof, and the payment of the sum of \$55, according to the conditions of a certain promissory note for said amount, by said party of the second part, the above named Realty Revenue Guaranty Company agrees to purchase the entire crop of small grain,

consisting of wheat, oats, flax, barley, corn, or rye, from said party of the second part, at the rate of \$5.00 per acre, grown during the season of 1899; all of said crops being on the following described lands, to wit: 160 acres southeast quarter of sec. 20, T. 146, R. 65; 60 acres northwest quarter sec. 26, T. 146, R. 65. It is further agreed that said party of the second part is in no manner bound to sell said crops to the said Realty Revenue Guaranty Company, except at his own option. It is further agreed that said party of the second part shall cultivate said crops in a husbandlike manner, sow, plant, garner, gather, harvest, thresh, and otherwise care for said crops in due season and in an economical manner. Said party of the second part agrees to notify said Realty Revenue Guaranty Company in case of any damage to said crops within five days thereafter, and of his intention to avail himself of his option to sell before said crops are harvested, and shall, within five days after threshing the same, give notice to the company of his election to sell under this contract. After said election to sell, said party of the second part agrees to deliver said crops at the nearest market, if directed so to do by said Realty Revenue Guaranty Company. Should the party of the second part fail to perform any of the conditions herein by him to be performed, time being the essence hereof, or if any of the warranties or statements made by him are untrue, ³⁰⁵ the said option shall terminate. Nor shall said guaranty company be liable under this contract should any damage or loss accrue to said crops after September 15 of this year, or after said crops are harvested, nor in any manner, except as herein stipulated. This contract shall terminate December 1st following date hereof. In witness whereof, the said Realty Revenue Guaranty Company has caused these presents to be executed and signed by its president and secretary, and caused its corporate seal to be hereto attached, this seventh day of April, 1899. Realty Revenue Guaranty Co., by L. E. Utley, President. A. L. Brice, Secretary. [Corporate Seal.]”

What was the object of this contract and what was its legal effect? The petitioner says it was an option contract of sale of a crop. We cannot conceive that the farmer's primary object was to sell his crop. Ordinarily, a man does not pay a premium for the privilege of selling his produce. Nor was it the primary purpose of the company to purchase the crop. From the very terms of the contract, it is certain that it must lose money upon all the grain it buys under the contract. More-

over, grain is bought and sold by the bushel, and not by the acre. We think the contract was the identical contract which the articles of incorporation authorize the company to enter into. It was a contract by which the guarantor undertook to guarantee or assure to the farmer a certain revenue from his land. How did the parties proceed to execute such a contract? It was well known to both parties that an acre of land in this state, farmed as the farmer contracts to farm it in this case, will produce a crop of a value far in excess of five dollars, and the value can be reduced to or below that figure only by the happening of one or more of the contingencies hereinbefore mentioned. But such contingencies may happen, and to be absolutely assured that his land will yield him at least five dollars per acre the farmer is willing to pay something; and the corporation, expecting to do business over a wide scope of country, believes that it can with profit to itself assure the farmer a crop worth five dollars per acre for the compensation which the farmer is willing to pay therefor. But what is this in substance except a contract to indemnify the farmer against loss arising from the happening of a contingent event, and that is our statutory definition of insurance. The farmer was seeking and paying for protection, and the corporation was seeking to make a profit by extending this protection for the consideration paid by the farmer. True, it is not all loss that is insured against. The contingencies named may reduce the value of a crop from twenty dollars per acre until, in the judgment of the owner, it barely exceeds five dollars per acre, and there is no liability under the contract. It is the loss below five dollars per acre that is insured against. The effect of the contract is very like that of a valued policy of insurance. When the contingency happens that creates a liability under the policy, then the full amount of the policy must be paid, but the insured is entitled to all the salvage.

306 In *Claflin v. United States Credit System Co.*, 165 Mass. 501, 52 Am. St. Rep. 528, the defendant was held to be an insurance company. The contract is thus stated by the court: "It was made on April 6, 1891, and purports to bind the defendant, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied." A contract to purchase bad accounts and judgments at a fixed price, irrespective of value, cannot be distinguished in principle from a contract to purchase damaged crops at a fixed price, irrespec-

tive of value. That same company was held to be an insurance company in *Shakman v. United States Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920, and the reasoning of the court is very pertinent to this case.

It is doubtless true that there has been a studied effort to keep this corporation outside the operation of our insurance laws; but the purpose and effects of its contracts are too clear to admit of doubt. They exactly meet the requirements of an insurance contract, and the corporation for which the petitioner acted as agent is an insurance company. The act charged in the complaint is a crime under our statutes, and there is reasonable and probable cause to believe the petitioner guilty of committing the act. He is therefore properly held.

The writ issued in this case is discharged, and petitioner remanded to the custody of the sheriff of Foster county.

All concur.

INSURANCE.—A STATUTE MAKING IT A MISDEMEANOR for an agent to transact insurance business without obtaining a certificate authorizing him so to act from the state superintendent of insurance, is valid: *State v. Stone*, 118 Mo. 388, 40 Am. St. Rep. 388.

INSURANCE—WHAT IS.—An agreement to purchase at a fixed price all accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied, is a contract of insurance: *Claffin v. United States Credit System Co.*, 165 Mass. 501, 52 Am. St. Rep. 528; so, too, is an agreement to indemnify a person against loss arising from the insolvency of his customers, and a corporation authorized to make it is an insurance company: *Shakman v. United States Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920.

EDDIE v. EDDIE.

[8 NORTH DAKOTA, 376.]

CONFLICT OF LAWS—DESCENT.—If both the real and the personal estate of an intestate, as well as his domicile, at the time of his death, are within a state, the laws of such state must govern in the descent and distribution of all of his property.

ADOPTION OF CHILD—CONFLICT OF LAWS.—An adoption in a foreign country by the father's publicly receiving into his family, recognizing and acknowledging as his own, an illegitimate child, does not entitle the child so adopted to inherit land from him under sections 2806 and 3744 of the North Dakota Revised Codes. These statutes, although permitting an illegitimate child adopted, by being publicly acknowledged and taken into the family by the father, to inherit from him, apply only to parents and children domiciled within the state at the time when the acts of adoption in fact occur.

J. A. Sorley, for the appellants.

T. R. Bangs and W. H. Standish, for the respondent.

378 YOUNG, J. This is a contest between the two sets of children of one Henrick Nickolai Eddie, deceased, to determine the right of succession to his estate. Eddie, the decedent, died in Grand Forks county October 9, 1886, without will, and possessed of considerable property, both personal and real, situated in that county. Henrick Ferdinand Eddie and Axel Eddie, who are plaintiffs herein, are the natural children of decedent. The defendants are his children by marriage, and are legitimate. The entire contest is as to the right of these natural children to share in the estate of their father by inheritance, under the laws of this state. The estate was probated in Grand Forks county, and final decree made, establishing the heirship of the defendants, and providing for a distribution of the estate in accordance with such findings. It appears that up to that time the existence of these natural children was unknown to the legitimate heirs. At least no claim was asserted by them in the probate court until some time after the final decree, when they presented a petition to that court setting out all of the facts upon which they base their right to inherit, asking that the decree establishing heirship and ordering distribution before made be vacated, and that they be permitted to share in the distribution of the estate as heirs of their father. The decree of the probate court, made after a full hearing of the evidence, denied their right to inherit. From that decree plaintiffs appealed to the district court, where the decision of the probate court was reversed, and a decree was entered finding that plaintiffs were the legitimated children of decedent, and as such were his heirs, and directing the probate court to take such steps as were necessary to admit them to a full participation in the estate as heirs. From this decree the defendants appeal to this court for a review of the same questions presented below.

The undisputed facts which are pertinent to the issues are these: Henrick Nickolai Eddie, the decedent, was born in the kingdom of Norway in 1843, near Levanger, where he resided continuously until 1869, when came to the United States, where he lived thereafter and up to the time of his death. Prior to coming to this country he cohabited with one Sarah Rinnan, who also lived in Levanger. The plaintiffs are the issue of this intercourse; Henrick Ferdinand Eddie, born in 1861, and Axel Eddie, born in 1865. Both of these children lived with their

mother up to the time of her death, which occurred about twenty years ago, and have always resided in Norway. There is no claim that their parents were ever married. After coming to this country, and in 1871, at La Crosse, Wisconsin, Henrick Nickolai Eddie, the decedent, married Oleaana Gorden. The defendants are the issue of that marriage. After leaving Norway, in 1869, decedent never saw or communicated with the plaintiffs ³⁷⁹ or their mother in any way. Neither did he ever acknowledge these children as his own by written instrument. The plaintiffs base their right to inherit upon a claim that they were adopted by their father, and thereby became legitimated, and, as a result, became his heirs under the laws of this state. The material facts upon which the claim of adoption rests are found in the seventh finding of fact of the district court, which is as follows: "That during all the time after the birth of each of said plaintiffs, and up to the date of the immigration of said Henrick Nickolai Eddie to the United States of America, said Henrick Nickolai Eddie treated each of these plaintiffs as if he were a legitimate child of him, said Henrick Nickolai Eddie. That during said time he furnished support and maintenance to each of said children and to their said mother. That during said time he corrected and reprovved said children. That during said time he lived a portion of the time with the said children and their said mother at Levanger, aforesaid. That during all of said time the said Henrick Nickolai Eddie publicly acknowledged each of said children, Henrick Ferdinand and Axel Eddie, as his own." The district court, in its conclusions of law, found that plaintiffs were adopted by decedent as his own children, by his acts, prior to 1869, and that they were his heirs at law, and as such entitled to participate in the distribution of his estate. It will be noticed that all of the acts of the decedent which it is contended amount to an adoption of plaintiffs occurred in Norway, when he and plaintiffs and their mother were all residents of that kingdom. There is nothing in the record to show what the law of Norway is, or that there is any legal authority in that country for the legitimating or adoption of bastard children. Neither is it at all material, for appellants do not claim to have been legitimated and given the capacity to inherit by the laws of their own country, but rest their alleged status of legitimated children and claim to inheritable blood solely upon the laws of this state, where their father resided at his death, and where the estate is situated. It is contended that the acts of recognition by their father which oc-

curred in Norway prior to the year 1869, which are set out in the finding of fact before quoted, legitimized and made them heirs under section 2806 of the Revised Codes, which reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it was a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." The district court reached the conclusion that there had been an adoption, and consequent legitimation, under this statute. Accepting the facts found by that court as true, we are yet not able to reach the same result. It is agreed that the laws of this state regulating the descent and distribution of property govern this estate. This follows necessarily from an application of the rule that personal property descends ³⁸⁰ according to the law of domicile of the owner, and real estate under the law of the place where situated, for in this case both the real and personal property, as well as the domicile of the owner, were within this state. Comity between states has not gone to the extent of recognizing the right of one state to designate the persons to whom realty situate in another state shall descend, and doubtless never will. Another principle which is as universally recognized is that the laws of each state fix the status of the persons domiciled therein. This was expressed in *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, as follows: "It is general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every state so far as they are not inconsistent with its own laws and policy." We may also say that the domicile of an illegitimate child is that of its mother until it acquires one for itself, and that these claimants were, therefore, at all times domiciled in the kingdom of Norway. It is apparent that the rights of claimants are determined by the construction to be given to section 2806 of the Revised Codes, upon which they rely. Is it a statute of descent or a statute fixing status? If it is a statute of descent, merely descriptive of a class of illegitimates who are thereby authorized to inherit property situated in this jurisdiction, the fact that claimants were domiciled beyond the confines of the state, and in a foreign land, will deprive them

of no rights which the state may have given to them in the estate of the intestate. But, on the other hand, if it is construed as a statute of adoption, creating for those domiciled within the state a status of legitimacy between the illegitimate and its father, in all things like the adoption of another child save in the procedure, and followed by the same legal consequences, both to parent and child, then there can be no pretense that the acts which were all done without the jurisdiction, and in a foreign state, would be a compliance with the section quoted so as to constitute an adoption as so construed; for neither father, mother, children, nor property were in the state or territory when the acts of adoption are said to have occurred. Their own land attached to their status the stigma of illegitimacy. While so domiciled, it was not within the power of another state to remove it. But this absence of power to make or alter the status of the subjects of another state implies no restriction upon the right of the state to control the descent of real estate within its limits, and to lend the aid of its laws to convey their respective interests therein to such classes of persons as it may have designated as heirs, regardless of where they may be domiciled, or the status which they may have. Chapter 8 of the Civil Code, in which the section of the statute is found through which the plaintiffs claim a right to inherit, is composed of ten sections. The first seven sections provide for the adoption, by any adult person, of minor children other than his or her own, by a ³⁸¹ decree of the district court of the county of the residence of the adopting parent. The eighth fixes the status of the child so adopted as that of one born in lawful wedlock. The following section provides that the decree shall deprive its natural parents of all legal rights respecting it, and frees the adopted child from the obligations of obedience and maintenance to its natural parents. The chapter is concluded by the section in question, which is as strictly a statute of adoption as those preceding. By the former, one may adopt only the child of another, and then by a decree of court entered in the public records. By the latter a father is permitted to adopt his own child, not by public proceedings, and by written document containing and perpetuating the record of his child's disgrace and his own shame, but by voluntarily assuming the usual relation and duties of a father; or, as expressed in the statute, "publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child." The adoption

in fact is made an adoption in law, and the statute serves the same purpose as the decree, "and such child is thereupon deemed for all purposes legitimate from the time of its birth." In short, all of the mutual rights and duties of parent and child are called into being, placing upon the father the legal obligation of care, education, and support, and giving to him the custody of the child, as well as a right to its earnings, while the child so adopted becomes bound to perform all of the duties of a legitimate child. The status thus created is that of a child adopted by regular procedure of court. Section 2802 of this chapter by its language expressly limits the right of adoption by application to the district court to inhabitants of the state. While it is true the father of an illegitimate child is not required to pursue the same steps to legally adopt his own child, yet, in view of the fact that the same status is created, and the same mutual and legal obligations between the adopting parent and his child result, the conclusion is irresistible that this section also only applies to parents who are domiciled within the state at the time the adoption in fact occurs. This view is in accord with the holding of the supreme court of California, where this same statute has been in force since 1873: See *Blythe v. Ayres*, 96 Cal. 532. One of the legal consequences resulting from the status so created is the right to inherit, but this right does not arise from the mere act of adoption, but is elsewhere expressly given to one who has been so adopted. Chapter 41 of the Civil Code fixes the rights of succession to the estate of intestates. Section 3744 of that chapter provides for inheritance by illegitimate children. The references to inheritance by children in section 3743 of this chapter are to legitimate children: See *In re Magee's Estate*, 63 Cal. 414. Section 3744 of the Revised Codes reads as follows: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir of his mother, and inherits his or her estate in whole or in part, as the ³⁸² case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried and his father after such marriage acknowledges him as his child or adopts him into his family, in which case such child and all the legitimate children are considered brothers and sisters and, on the death of either of them intestate and without issue, the

others inherit his estate and are heirs, as hereinbefore provided in like manner as if all the children had been legitimate, saving to the father and mother respectively their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law or dissolved by divorce are legitimate." It will be noticed that by the first part of this section the father may, by a written acknowledgment, properly witnessed, enable his illegitimate child to inherit, and that in any case the child inherits from its mother, but in either case the inheritance is that of an illegitimate, and does not extend to the estates of either lineal or collateral kindred of either parent. On the other hand, by the succeeding provisions, when the relation of parent and child has been legally created, either by the marriage of the parents, and the subsequent acknowledgment of the child by its father, or the adoption of the child by the father into his family, such child then inherits as a legitimate child, along with children born in wedlock. The adoption into the family which here creates the right to inherit is the adoption provided for in section 2806 of chapter 8 of the Civil Code, which, as we have shown, must occur while the adopting parent is domiciled within the state. In this case both the petitioners and their father were domiciled in Norway when the acts of adoption are said to have occurred. Such acts did not, therefore, affect their status in this state. The petitioners were not adopted under the laws of this state, and are therefore not entitled to inherit under section 3744 of the Revised Codes.

The judgment of the district court is therefore reversed.

All concur.

DESCENT—CONFLICT OF LAWS.—Succession of personal property is governed by the law of the domicile, regardless of conflicting laws of the places where the property is situated: Succession of Petit, 49 La. Ann. 625, 62 Am. St. Rep. 659, and note. Descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situated: Williams v. Kimball, 35 Fla. 49, 48 Am. St. Rep. 238, and note; Short v. Galway, 83 Ky. 501, 4 Am. St. Rep. 168.

ADOPTION—CONFLICT OF LAWS.—A child born out of wedlock and legitimated under the law of another state is not thereby clothed with inheritable capacity: Smith v. Derr, 34 Pa. St. 126, 75 Am. Dec. 641, and note. Compare Smith v. Kelly, 23 Miss. 167, 55 Am. Dec. 87. Extraterritorial effect of adoption is discussed in the monographic note to Van Matre v. Sankey, 39 Am. St. Rep. 229-231.

STATE v. CRAWFORD.

[8 NORTH DAKOTA, 589.]

BURGLARY—ENTRY BY INSERTION OF INSTRUMENT.

If one instrument is used both for the purpose of breaking into and of committing an ulterior crime within the building, it is sufficient to show an entry by proving that the instrument so used was inserted into the building and used in committing the burglary, without showing that the accused entered the building in person.

BURGLARY—ENTRY BY INSERTION OF INSTRUMENT.

The boring of holes into a granary from the outside and thereby extracting grain therefrom is such a breaking and entering of the building as to constitute burglary, without any personal entry by the accused.

BURGLARY—ENTRY BY INSERTION OF INSTRUMENT.

If one instrument is employed, not only to break into, but also to effect the only entry contemplated or necessary to the consummation of the criminal intent, and when it is intruded into the building, breaking it, effecting an entry, enabling the person introducing it to consummate his intent, and thus acquire dominion over the property intended to be stolen, the crime of burglary is complete, without any entry in person by the burglar.

F. B. Morrill, state's attorney, and E. Engerud, for the appellants.

D. R. Pierce, for the respondent.

541 WALLIN, J. The record in this case shows that the defendant was charged with the crime of burglary in the third degree, by an information filed against him by the state's attorney of the county of Cass, and that the defendant pleaded not guilty to such charge, whereupon a trial was had. At the close of the testimony offered in behalf of the state, and on motion of counsel for the defendant, the trial court advised and practically directed a verdict of acquittal, and such verdict was accordingly returned. The defendant was then discharged from custody, despite the protest of the state's attorney, who requested the court to hold the defendant to bail pending an appeal of the case in this court. The state's attorney assigns as error the direction to acquit, and the refusal of the trial court to hold the accused to bail pending the appeal.

There is no conflict of evidence in the case, nor is there any dispute between counsel as to the facts. The evidence shows that at the time and place stated in the information there was a certain building used as a granary, in which there was stored in bins about eight hundred bushels of wheat, and that in the night-time three holes were bored with a two-inch auger through the walls of the granary, and into one of the wheat bins. The

three holes were so connected together as to make one large opening through the walls, and into the wheat bin. It further appears that there was a depression in the mass of wheat directly over the aperture made by the auger, indicating that wheat had passed out of the bin through such aperture to the amount of several bushels, and, further, that some wheat was spilled on the ground directly under the opening through the wall of the granary. Other evidence tended to connect the defendant with the felonious asportation and sale of the grain. Upon this evidence the question is presented whether the state had made out a prima facie case when the evidence closed and the state rested its case. Defendant's counsel contends that the state had failed to establish two of the three essential elements of the crime charged, viz., the entry into the granary, and the intent to steal therein. In support of this theory, attention is called to the evidence which ⁵⁴² clearly indicates how the grain was extracted from the granary, and negatives the idea that the person who bored the holes through the walls went inside the building to steal therein, or for any purpose whatever. Nor is it claimed in behalf of the state that the accused personally went inside the granary for any purpose. As to the intent to steal inside the granary, the evidence, in our judgment, leaves no room for doubt. The accomplished fact clearly reveals the motive and purpose with which the act was done. The wheat was stored within the granary, and the evidence tends to show that the same was, by the acts and agency of the accused, taken possession of while in the granary, and removed from the inside of the granary to the outside, and was thereafter taken away from the premises in the night-time. The defendant, under the evidence, acquired dominion over the grain taken while the same was within the building, and his intention to do so is too clear for discussion. It is true that the accused was aided by natural laws in taking possession of the grain within the granary, but such laws were deliberately invoked and set in motion by the acts of the defendant, done by his agency operating within the building.

But counsel most strenuously contends that inasmuch as the evidence shows that the grain was removed through the opening made with an auger, and not otherwise, it therefore appears affirmatively that the defendant did not and could not have gone into the building, and hence that the state failed to establish the essential element of an entry. We cannot accept this conclusion from the evidence. It is manifest that the auger,

guided by the person who bored the holes, passed through the walls of the granary into the mass of wheat therein, and also manifest that it was the auger operating within the building which set the law of gravitation in motion, and thereby enabled the man guiding the auger to remove the property from within the building to the outside. Using the auger for the double purpose of breaking and taking possession of the property within the building brings the case within the rule announced in the authorities hereafter cited. We quote first from the authorities cited by defendant's counsel. The rule is expressed in Bishop's New Criminal Law, volume 2, section 93, as follows: "And there is no burglary if simply the tool used for breaking goes in, and neither any part of the person nor the instrument by which the ulterior felony is to be perpetrated does." The same section contains the following language: "Thus, to raise a window by placing the hands outside of it, and then thrust in a bar for forcing open the inside shutter, or to make a hole through a door with a centerbit, whereby some of the chips fall in, is insufficient, because neither the bar nor the centerbit was to be employed about the ulterior felony." Another textwriter cited by defendant's counsel puts the rule as follows: "Whether the introduction of an instrument will be such an entry as to constitute burglary depends upon the object with which the instrument is employed. Thus, if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of ⁵⁴³ committing the contemplated felony, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand is not in, this is an entry": See 1 Roscoe's Criminal Evidence, *366, citing other authority. The rule as announced in these authorities seems to be well established, and generally acquiesced in without dissent; and as, in our judgment, it applies to the facts of this case, it will govern our decision. As has been seen, we hold, under the evidence, that the auger was used first in breaking, and again deliberately used for the purpose of committing the ulterior crime of stealing wheat within the granary, thereby constituting an entry, within the rule. Counsel for the state has cited extracts from other textwriters, but we deem it unnecessary to quote them in support of a rule so well established. The case of Walker v. State, 63 Ala. 49, 35 Am. Rep. 1, is directly in point. In that case the crime charged was burglary, and it was committed by boring a hole with an auger into a granary in which grain was kept, and by this means the grain was removed from the gran-

ary. In the course of the opinion the court used the following language: "When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break but to effect the only entry contemplated or necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his intent—the offense is complete. The instrument was employed not only for the purpose of breaking the house, but to effect the larceny intended. When it was intruded into the crib, the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it, the corn ran into the sack he used in its asportation. There was a breaking and entry, enabling him to effect his criminal intent without the use of any other means, and this satisfies the requirements of the law." This case seems to us not only to be intrinsically sound in legal principle, but one which apparently is sustained by the unanimous voice of authority upon the question. The order directing an acquittal will be reversed upon the ground that it was error to hold that the evidence did not tend to establish an entry. The case should have been submitted to the jury with proper instructions upon the matter of the entry, as well as upon the other legal aspects of the case.

We are of the opinion that this court cannot properly consider the other assignment of error, viz., that predicated upon the refusal of the trial court to hold the accused to bail pending an appeal from the order directing an acquittal. Such refusal occurred after the order appealed from was made, and the same is in no manner connected ⁵⁴⁴ with the merits of the order from which an appeal is taken.

All the judges concurring.

BURGLARY—ENTRY, WHAT IS.—One who, intending to steal corn, bores a hole through the bottom of a crib from the outside and draws off the grain in a sack, is guilty of burglary: *Walker v. State*, 63 Ala. 49, 35 Am. Rep. 1. Entry by an instrument with which it is intended to commit a felony is sufficient to constitute burglary: *State v. McCall*, 4 Ala. 643, 39 Am. Dec. 314. For instances of breaking and entry, consult the monographic note to *People v. Richards*, 2 Am. St. Rep. 383-388.

STATE v. KELLAR.

[8 NORTH DAKOTA, 563.]

CRIMINAL LAW—TESTIMONY OF ACCOMPLICE—CORROBORATION.—Under the North Dakota statute, no conviction of any crime can be had upon the uncorroborated testimony of an accomplice.

INCEST—ACCOMPLICE.—A female participant in incestuous intercourse, whose action is voluntary and uninfluenced by any element of coercion, either by force, fear, fraud, or undue influence is an accomplice in the crime of incest.

INCEST—ACCOMPLICE—WHEN QUESTION FOR JURY. If the coercion of a female participant in incestuous intercourse is sought to be shown inferentially, the question whether or not she is an accomplice in the crime of incest is generally one of fact for the jury to determine.

H. G. Voss, for the appellant.

J. G. Campbell, state's attorney, for the respondent.

563 BARTHOLOMEW, C. J. There is but one question in this case that need be considered. The defendant has been convicted of the crime of incest, the female being his daughter. It is not claimed by the state, and could not be upon the record, that there is any evidence tending to connect the defendant with the commission of the crime except the evidence of the daughter. Our statute (Rev. Codes, sec. 8195) reads: "A conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." The defendant asked the following instruction: "Under the laws of this state no conviction can be had in a criminal case upon the uncorroborated testimony of an accomplice. It is for you to determine from the testimony in this case whether or not the witness, Lizzie Kellar, was an accomplice in the commission of this crime. If you find as a fact that sexual intercourse was had between the defendant and the said Lizzie Kellar, and you find that she voluntarily submitted to such intercourse without being forced, then she, in law, is an accomplice to the commission of said offense, and no conviction in this case can be had unless her testimony is corroborated by some other credible testimony in this case; and the corroboration is not sufficient if it merely shows the commission of the ⁵⁶⁴ offense, or the circumstances thereof, but such corroborative testimony must tend to connect

the defendant with the commission of the crime." This instruction was refused, nor did the court, in its charge to the jury, in any manner refer to this subject. This was error, which compels us to reverse this judgment. Wharton's Criminal Evidence, section 440, defines an accomplice as "a person who knowingly, voluntarily, and with a common intent with the principal offender unites in the commission of a crime." While this definition has been often quoted, and is strictly accurate in the great majority of cases, it is not, we think, universally accurate. Two persons may be equally guilty in the commission of a crime, may both be present, and equally participate in its commission. As between them, there can be no "principal offender," yet each is the accomplice of the other. We prefer Black's definition: "An associate in crime; one who co-operates, aids, or assists in committing it." That the female participant in incestuous intercourse, whose action in the matter is voluntary and uninfluenced by any element of coercion, either by force, fear, fraud, or undue influence, is an accomplice in the commission of the crime of incest, is, we think, firmly settled in the law: *State v. Jarvis*, 18 Or. 360; *Dodson v. State*, 24 Tex. App. 518; *Freeman v. State*, 11 Tex. App. 92, 40 Am. Rep. 787; *State v. Dana*, 59 Vt. 614; *Porath v. State*, 90 Wis. 527; *Clark v. State*, 39 Tex. Cr. Rep. 179, post, p. 918; *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349; *De Groat v. People*, 39 Mich. 124; Wharton's Criminal Evidence, sec. 440; 10 Am. & Eng. Ency. of Law, 347, note 1. Where force, fraud, or fear is used to overcome the will of the female, she is not an accomplice, as the above authorities abundantly show. We have read the evidence in this case with care. Certain it is that there is nothing in the evidence from which a court could say, as matter of law, that the female was coerced. If fear of her father, or his undue influence over her, overcame her will, she was not an accomplice. But this was a question for the jury. In *Porath v. State*, 90 Wis. 527, the court said: "It does not necessarily follow in such cases that the female is to be regarded as an accomplice, and particularly in a case like the present, in view of the relation between the parties, and the coercive authority of her father over her: *Raiford v. State*, 68 Ga. 672; *Norton v. State*, 106 Ind. 163. If, in the commission of the incestuous act, the female was the victim of force, fraud, or undue influence, so that she did not act voluntarily, and join in the commission of the act with the same intent that the accused did, then she ought not to be regarded as an accomplice. In all

such cases, where it is to be proved inferentially, the question of accompliceship is one of fact for the jury: Wharton's Criminal Evidence, sec. 440; *Mercer v. State*, 17 Tex. App. 452." See, also, *State v. Haynes*, 7 N. Dak. 352. The wording of the instruction asked may, perhaps, be open to criticism. The words "without being forced," as therein used, are somewhat bald, and might imply that physical force was necessary. Strictly, ⁵⁶⁵ however, the instruction asked was correct, and should have been given; but a modification as indicated would have improved it. The refusal of the court to give this instruction, and its failure to instruct upon the question in any form, constitute error, which necessitates reversal and a trial de novo.

Reversed.

All concur.

INCEST—ACCOMPLICE.—A woman who consents to the crime of incest knowingly, voluntarily, and with the same intent which actuates the man, is his accomplice: *Shelly v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926.

INCEST—ACCOMPLICE, TESTIMONY OF.—A conviction for incest cannot be sustained if based upon the uncorroborated testimony of the woman, who, if such testimony is true, was an accomplice, voluntarily yielding herself to the incestuous intercourse: *Shelly v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926; *Stewart v. State*, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 35. In incest the woman is an accomplice, and in a prosecution therefor her testimony is subject to the rule respecting accomplice testimony: *Freeman v. State*, 11 Tex. App. 92, 40 Am. Rep. 787. When conviction may be sustained on uncorroborated testimony of accomplices is the subject of a note to *Commonwealth v. Price*, 71 Am. Dec. 671-673.

ACCOMPLICES—QUESTION FOR JURY.—Whether or not a witness is an accomplice is a question of fact for the jury: *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65; *Williams v. State*, 83 Tex. Cr. Rep. 128, 47 Am. St. Rep. 21.

**DONOVAN v. ST. ANTHONY AND DAKOTA ELEVATOR
COMPANY.**

[8 NORTH DAKOTA, 585.]

CHATTEL MORTGAGES—MORTGAGEE AS WITNESS.—

A mortgagee in a chattel mortgage is disqualified from being a subscribing witness thereto, by reason of his being an immediate party to the instrument.

CHATTEL MORTGAGES—COMPETENCY OF SUBSCRIBING WITNESSES TO—EFFECT AS NOTICE.—If two witnesses are required to a chattel mortgage, the filing of such mortgage witnessed only by the mortgagee and one other person does not give constructive notice of its existence.

Cochrane & Corliss, for the appellant.

J. C. Monnet, for the respondent.

586 YOUNG, J. But one question is presented by this appeal, and that is whether a mortgagee in a chattel mortgage is qualified to act as an attesting and subscribing witness to its execution. Briefly, the preliminary facts are these: Plaintiff has a chattel mortgage covering a quantity of wheat which was purchased and received by the defendant from plaintiff's mortgagor, and admittedly without actual notice of plaintiff's mortgage thereon. The mortgage is properly signed by the mortgagor. To the left of his signature is the attestation, first, the words, "Signed, sealed, and delivered in the presence of," and just underneath them the signatures of the two witnesses, E. I. Donovan and Charles C. Keenan. Donovan is the mortgagee, and is so named in the instrument. The mortgage was filed in the proper office. Plaintiff sues for the alleged conversion of the grain. At the trial in the district court a verdict was directed for the defendant, upon the ground that the mortgage was not witnessed as required by law, and that the filing thereof did not, therefore, impart constructive notice of its existence. Later, a new trial was granted, upon plaintiff's motion. This appeal is from the order granting a new trial.

It is apparent that in reversing his former conclusion the district judge was controlled by the recent case of *Fisher v. Porter*, 11 S. Dak. 311, in which that court, in passing upon this identical question, and under statutes which are the same as those in force in this jurisdiction, held squarely that it is competent for a mortgagee to witness his own mortgage. Section 4384 of the Compiled Laws is the same in language as sec-

tion 4738 of the Revised Codes, and reads as follows: "A mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed." After quoting this section, the South Dakota court said: "Manifestly, the foregoing provision should be construed with reference to the law of the state relating generally to the competency of witnesses, and unless some limitation can be found as to the character of the persons in the presence of whom the mortgagor must sign his name, and by whom a chattel mortgage must be witnessed, we would not be justified in holding that a mortgagee, on account of his interest, is not a person, in contemplation of the statute, authorized to become a subscribing witness. Under a statute like ours, requiring, without any restriction, that a chattel mortgage, in order to be filed, must be witnessed by two persons, and providing that no person offered as a witness can be excluded or excused from testifying on account of his interest in the event of the action or proceeding, we perceive no ⁵⁸⁷ valid reason for holding a mortgagee disqualified as an attesting or subscribing witness: Comp. Laws, sec. 5260. It seems entirely consistent with the legislative aim to hold that a person who would be a competent witness in an action involving the subject matter of a deed or mortgage has the legal capacity to become a subscribing witness thereto; and under statutes measurably less compatible with the doctrine than our own, it has been so held: *Johnson v. Turner*, 7 Ohio, pt. 2, 216; *Welsh v. Lewis*, 71 Ga. 387; 2 *Jones on Real Property*, 1099; *Webb on Record Titles*, 127." This decision evidently stands alone in announcing such a conclusion, for neither the exhaustive research of counsel nor our examination of the authorities has discovered a single case making a similar holding as to the competency of a mortgagee to attest the execution of his own mortgage. Further, the decision is not supported by the two cases upon which it purports to be based. In neither case was the question of competency of the immediate parties to the instrument to act as attesting witness involved. In *Welsh v. Lewis*, 71 Ga. 387, the holding was merely that it was not illegal for a brother in law of the mortgagee to witness the mortgage. In *Johnson v. Turner*, 7 Ohio, pt. 2, 216, it was objected that one of the subscribing witnesses to a certain trust deed to a banking corporation was disqualified as an attesting witness by reason of being a stockholder. Because of that interest, he was excluded from testify-

ing as a witness as to such deed under the law then prevailing in that state. Nevertheless, the court held him competent to attest the deed, utterly repudiating the doctrine that the test is competency to testify in court; using this language: "The statute (vol. 31, sec. 1, p. 346) requires the deed to be executed 'in the presence of two witnesses, who shall attest such signing and sealing and subscribe their names to such attestation.' Unless the express provisions of this statute, or its plain inference, lead to the conclusion that the witnesses to a deed must be credible and competent to prove its execution at the time of their attestation, and that such was the intention of the legislature, reluctantly indeed would this court adopt such an opinion. If such be the law, it is time to look around us and ascertain by whom our deeds bear witness. Who ever instituted an inquiry, when a witness was called to attest a deed, whether he was competent or incompetent to testify in a court of justice; whether persons might not subsequently be found who would impeach him for the want of character for truth; whether conviction for crime, or the want of a correct opinion of the providences of God, according to the notions of others, might not exclude him from giving evidence? Precarious indeed are our titles, if such is the principle to be established. . . . The plaintiff's counsel have very properly said the statute is silent as to the qualities of the witnesses. It neither requires them to be competent to testify, white, credible, disinterested, of proper religious belief, nor innocent of crime, but leaves the grantor at liberty to select such persons as he sees proper." The case of *Smith v. Chamberlain*, 2 N. H. 588 440, cited by the Ohio court, fully sustains their views. Not only are the Georgia and Ohio cases not in point, but the supreme court of Ohio decided very recently, in the case of *Amick v. Woodworth*, 58 Ohio St. 86, directly to the contrary from the holding of the South Dakota court—holding that a mortgagee was not qualified to attest his own mortgage. The court in that case said: "The true reason of the disqualification, we apprehend, is that, to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on grantors, and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent bona fide transactions"; adding that "it is probably

unnecessary to notice that this question was not involved in *Johnson v. Turner*, 7 Ohio, pt. 2, 216, and that case is unaffected." That a mortgage cannot be attested by the mortgagee was also decided by the supreme court of Alabama in *Seibold v. Rogers*, 110 Ala. 438—a chattel mortgage case. See, also, *Coleman v. State*, 79 Ala. 49.

There is a line of authorities, however, and we think the majority of cases hold, that persons who are not competent to testify in court are not qualified to act as attesting witnesses. Recent legislation has made it possible for all persons interested in the execution of deeds or mortgages to testify concerning them, including the parties to the instruments. Therefore, all persons can attest their execution. Such is the reasoning of the South Dakota court. But this conclusion, in our judgment, is too sweeping, in including the parties to the instruments attested; for their disqualification to attest does not, and never did, depend upon their competency or incompetency to testify in court relative to the instruments, but exists in the very nature of things—in the inherent impossibility of the immediate parties to a written contract to assume the attitude of strangers and spectators to its execution, which, we take it, is necessary in attesting witnesses. We might, then, following one line of cases, ask: "Were the subscribing witnesses competent to testify in court?" But, before the answer would be decisive, it must also appear that such persons were not incapacitated by being the immediate parties to the instrument to be attested. In *Smith v. Chamberlain*, 2 N. H. 440, that court, in discussing a statutory provision requiring a deed to be attested by two witnesses, said: "We have been much at a loss to conjecture why two witnesses were in this instance required by statute. Surely they were not intended to be placed round a grantor for the same reason they are placed round a testator. The most plausible conjecture is that it was intended to render the proof of the instrument more certain. If this were the object, there is good reason to suppose that the word 'witnesses' was in this instance used in the simple sense of spectators of the transaction." The act required of witnesses to chattel mortgages ⁵⁸⁹ by our statute is merely the attestation common in most of the states as means of proving instruments for record, or as component acts in their execution necessary to give them validity as the particular statute provides. It is "to signify by subscription of his name that the signer has witnessed the execution of the particular instrument": 3 Am. & Eng. Ency. of Law, 2d ed., 274.

In *Seal v. Claridge*, L. R. 7 Q. B. Div. 516, Lord Selbourne, in answer to an inquiry as to the meaning of the word "attestation," said: "The word implies the presence of some person who stands by, but is not a party to the transaction," and elsewhere in the same case used this language: "I was at first surprised that no authority could be found directly in point, but, no doubt, the common sense of mankind has always rejected the notion that a party to a deed could also attest it." The South Dakota case makes competency to testify in court the sole test of capacity to attest. If we should accept this interpretation and apply it to the case at bar, our holding would be that a mortgage whose execution is attested by the mortgagee and one outsider is properly attested, under the statute. This nullifies the statute, and amounts to a declaration that no outside witnesses are required. For instance, a mortgage is given by two persons to a third. The mortgagee may attest, and the mortgagors, one for the other. Then a person may give one mortgage to two persons. These two may furnish the attestation. In both cases the statute is complied with, as construed by the South Dakota case. We cannot adopt either this reasoning or conclusion. The legislature had a purpose in requiring two attesting witnesses to chattel mortgages as a prerequisite to their filing as public records. The primary object, no doubt, was to afford satisfactory proof to the recording officer of the genuineness of the instrument, but, aside from this, it was also to provide a guaranty to the public at large of the bona fides of the transaction. The signatures of the parties to the mortgage in the space for witnesses furnish no additional proof to the register of deeds as to the execution of the mortgage, and add nothing to the means by which the public may judge of its integrity. But not only is the construction contended for by respondent repugnant to the intent and purpose of the statute, but is, we think, entirely out of harmony with its language, as commonly understood; for we think men generally understand it to mean the calling in of a person who is not a party to the transaction to hear and see its consummation, and subscribe his name as a witness to what the parties have in his presence consummated, and that parties to the contract are disqualified to act in that capacity; and such is the weight of authority. A mortgagee cannot, therefore, witness his own mortgage. The mortgage in question has then but one witness. The statute requires two, to admit it to filing, and there are no exceptions. The mortgage was not entitled to be filed, and the fact that it

was filed did not operate to give constructive notice of its existence.

The order granting a new trial is reversed.

All concur.

ATTESTING WITNESSES.—The statutory requirement that an instrument of conveyance shall be subscribed by two witnesses is imperative: *Meighen v. Strong*, 6 Minn. 177, 80 Am. Dec. 441. As to the competency of subscribing witnesses as affected by interest, see *In re Will of Lyon*, 96 Wis. 339, 65 Am. St. Rep. 52; note to *Simmons v. Leonard*, 30 Am. St. Rep. 882.

OLIVER v. WILSON.

[8 NORTH DAKOTA, 590.]

APPEAL FROM JUDGMENT BEFORE ENTRY.—If, after a hearing upon the merits, the trial court directs its clerk to issue a peremptory writ of mandamus, and to enter judgment in favor of plaintiff for his costs and disbursements, and, prior to the entry of such judgment, but subsequently to the service of such order, the defendant serves a notice of appeal to the supreme court stating therein that the appeal is taken both from the order directing the writ to issue and from the judgment, such appeal is premature and inoperative, and must be dismissed as to the judgment, but is operative as to the order.

APPEAL — ORDERS, WHEN APPEALABLE.—An order granting a peremptory writ of mandamus is a "final order affecting a substantial right made in a special proceeding," and therefore appealable under the statute.

APPELLATE PRACTICE—TYPEWRITTEN BRIEFS AND ABSTRACTS.—Although the abstracts and briefs filed in the supreme court are typewritten, and the briefs contain no references to the pages of the abstracts of evidence, these facts present no grounds for a dismissal of the appeal.

APPEAL FROM ORDERS—MOTION TO STRIKE OUT.—If, in an appeal from an order in a special proceeding which does not authorize or call for the settlement of a statement of the case by the lower court, the order appealed from was made upon an application based wholly upon certain papers and documents, all of which are transmitted to the supreme court, a motion to strike from the records certain of such documents, on the ground that they cannot be properly transmitted to the supreme court in the absence of a settlement of the case, is without force or merit, and cannot be entertained or granted.

EXEMPTIONS—RIGHTS AND DUTIES OF OFFICERS IN RESPECT TO.—If the defendant makes a formal demand for his exemptions upon the officer who has seized his property under a writ of attachment, the officer must exercise discretion as to turning over the property claimed; and, if such officer is convinced that the exemption claim is without foundation, he must refuse to comply with such demand.

MANDAMUS TO CONTROL OFFICIAL DISCRETION.—Mandamus does not lie to compel an officer to exercise his official discretion in favor of a claimant of exemptions and to turn over to him on demand his property seized under a writ of attachment.

MANDAMUS TO CONTROL OFFICIAL DISCRETION.—Mandamus does not lie to compel a ministerial officer to act in a particular manner in any case where the officer's action or nonaction depends upon the exercise of official discretion.

EXEMPTIONS — CLAIM OF—ATTACHMENT—REMEDY AGAINST OFFICER.—Defendant, claiming an exemption in attached property, has a remedy against the attaching officer by motion to discharge the attachment, if the seizure is made under writ of attachment; and if the motion is granted, the property must be released from the levy.

EXEMPTIONS — CLAIM OF—ATTACHMENT—REMEDY AGAINST OFFICER.—If an officer unlawfully refuses to turn over exemptions demanded and claimed by the defendant in attachment, he may maintain a civil action in the nature of trespass, trover, or replevin against such officer and his bondsmen.

Barnett & Reese, for the appellant.

Morrill & Engerud, for the respondent.

⁵⁹¹ **WALLIN, J.** The record in this proceeding discloses that the plaintiff made application to the district court for a peremptory writ of mandamus, basing said application upon her own affidavit, which is, in substance, as follows: That an action was then pending in the district court for Cass county for the recovery of rent, wherein this plaintiff was defendant, and Northern Light Lodge No. 1, etc., a corporation, was plaintiff; that in said action a writ of attachment had issued, and been delivered to defendant herein for service as sheriff; that defendant had, by virtue of said writ, levied upon and seized a certain piano and piano stool belonging to this plaintiff; that within proper time, and in conformity to the statute regulating exemptions, this plaintiff caused to be served upon the defendant a verified schedule of all of her personal property, and demanded of the defendant that he set aside to this plaintiff her personal property exemptions to the amount of fifteen hundred dollars, and in said notice appointed one Brown as one of the appraisers of said property. The affidavit further set out that said civil action was ⁵⁹² not brought for labor or physician's services, or for property obtained under false pretenses, and that the plaintiff is a married woman, residing in the county of Cass and state of North Dakota, and has two minor children depending upon her for support, and living with her, and finally it is set out in the affidavit that the defendant has neglected and refused to recognize plaintiff's said claim for exemptions, and refused to

cause said property to be appraised or set apart to plaintiff. The affiant asked the trial court to issue the peremptory writ, and thereby compel the defendant to proceed under the exemption law, and cause said property to be appraised, to the end that plaintiff might select her exemptions therefrom. Upon said affidavit an order to show cause was issued, and both the affidavit and order were served upon the defendant, requiring the defendant to show cause why the writ of mandamus should not issue as prayed for in said affidavit. At the hearing of the order to show cause the plaintiff offered in support of her application for the writ the said affidavit of this plaintiff and the order to show cause, and offered no other evidence, whereupon the defendant, by his attorneys, interposed objections to issuing the writ of mandamus, in substance, as follows: 1. That the plaintiff has not set out in her affidavit sufficient grounds or reasons for granting the writ; 2. That the plaintiff has a speedy and adequate remedy at law. These objections were overruled by the trial court, whereupon the defendant offered in evidence the complaint, and also the affidavit for attachment, in the civil action aforesaid. These papers, which were received in evidence without objection, need not be set out in detail. The complaint stated a cause of action for the recovery of rent. The affidavit for attachment was drawn under subdivisions 3-5, section 5352, of the Revised Codes. Upon this evidence the trial court made an order to the effect that the clerk of the district court should forthwith issue the writ, substantially as prayed for in plaintiff's affidavit therefor; and said order further directed said clerk to enter a judgment for costs and disbursements in plaintiff's favor, to which order the defendant excepted. Subsequently, and on March 7, 1899, the defendant caused a notice of appeal to this court to be served, and such notice stated that the appeal was taken both from the order and from the judgment.

In this court the respondent has made a preliminary motion to dismiss the appeal upon the following grounds: 1. That an appeal does not lie from an order granting a peremptory writ of mandamus; and 2. That the attempt to appeal from the judgment was premature; and 3. Upon the ground that no printed abstracts or briefs have ever been served, and that the typewritten briefs actually served do not contain assignments of error which refer to pages of the abstract.

It appears that the notice of appeal was served after the order directing the writ to issue had been served on counsel for the de-

fendant, but such notice was served a few hours prior to the entry ⁵⁹³ of the judgment by the clerk of the district court. From this it follows that the appeal from the judgment was premature, and we therefore sustain the motion to dismiss, so far as it relates to the judgment. But, in our judgment, the appeal, so far as it relates to the order, was properly taken, under the provisions of subdivision 2, section 5626, of the Revised Codes. The order was a final order affecting a substantial right, and was made in a special proceeding. It was final in the sense that no further order could be made in the special proceeding. Certainly, none could be made prior to the entry of judgment. It is true (and this court has so held) that a mere order directing the entry of judgment in an action is not appealable: See *In re Weber*, 4 N. Dak. 119; *Field v. Great Western Elevator Co.*, 5 N. Dak. 400; *In re Eaton*, 7 N. Dak. 273. But the case at bar is readily distinguishable from the cases cited, and must be determined upon the express language of the statute regulating appeals from final orders in special proceedings. No similar language is found in the statute relating to final orders directing the entry of judgments in civil actions. We suggest here, however, in the interests of good practice, that the statute now contemplates the entry of a judgment in a mandamus proceeding, and this accords with the practice in the state of New York. The judgment, in our opinion, should award the writ, as well as adjudicate upon the costs, in cases where the final order so directs. On appeal from such judgment, the order could be reviewed and the whole case disposed of: See Rev. Codes, secs. 5578, 5585, and especially sec. 6120.

The next ground of the motion to dismiss the appeal is based upon the fact that the abstracts and briefs served were typewritten, and that the briefs served were further defective in that they did not refer to pages in the abstract. It will be noticed that counsel does not claim that abstracts and briefs were not served by appellant within time. His objection goes entirely to their structure and make-up. But this ground affords no reason for dismissing an appeal to this court. Rule 39 of the amended court rules will authorize this court, in its discretion, to dismiss an appeal when there is a failure to comply with the requirements of the rules "within the times therein provided." This ground, so far as appears, does not exist in this case, and the motion to dismiss on this ground will therefore be overruled: See Supreme Court Rule 12, 6 N. Dak. xviii; also, *State v. McKnight*, 7 N. Dak. 444. It will be unnecessary, in disposing of

the motion, to determine the further question whether type-written briefs may properly be used in special proceedings, and upon that question we express no opinion here.

But counsel for the defendant has also moved in this court to strike from the files all papers and records other than plaintiff's affidavit for the writ of mandamus, the order to show cause, and the order granting the writ. This motion is made upon the ground that no statement of the case was settled or allowed in the trial court. ⁵⁹⁴ This motion must be denied. The appeal being from an order, the clerk of the district court was required to "transmit the order appealed from and the original papers used by each party on the application for such order." The case at bar does not authorize or call for the settlement of a statement of the case, inasmuch as the evidence offered upon the application for the order consisted of papers and documents only, and no claim is made in this court that any of such papers or documents are absent from the record transmitted here. Doubtless cases may arise where the settlement of a statement on appeal from an order would be proper, and a necessary practice, but this record presents no such case: See *Goose River Bank v. Gilmore*, 3 N. Dak. 188; citing *Bailey v. Scott*, 1 S. Dak. 337.

This brings us to a consideration of the merits, and the question first presented is whether mandamus is a proper remedy to compel an officer to turn over exemptions upon the state of facts presented by this record. In our judgment, this question requires a negative answer. The rule is well settled that either an action for conversion, or claim and delivery proceedings, will lie against an officer, where the officer has refused, on proper demand therefor, to turn over exemptions to the debtor. In such an action the sheriff's bondsmen may be joined. At common law, replevin would not lie against an officer in such case, because the property was regarded as being in legal custody, but this obstacle has been removed by statute in this state: See Rev. Codes, sec. 5332; also, 10 Ency. of Pl. & Pr. 101-105, inclusive, and cases cited in notes; also, *Thompson on Homesteads and Exemptions*, secs. 870-894, inclusive. This learned author, in his chapter treating of the remedies to which the debtor must resort for the protection of chattel exemptions, enumerates actions in the nature of trespass, trover, and replevin as the proper legal remedies, but makes no reference to mandamus as a possible remedy in this connection. Counsel for respondent cites one case—*State v. Wilson*, 31 Neb. 462—and we concede that the case

supports his contention; but our own researches have failed in discovering any other authority to the same effect. The case cited does not embrace citations of authority in its support, and we are convinced that the case is isolated from, and contrary to, the overwhelming weight of judicial opinion. Nor do we think that the Nebraska case is sound in legal principle. In our judgment, the matter of turning property over to a debtor, when the same has been formally demanded as exempt, is not infrequently a matter involving the exercise of official discretion. In this state the exemption right is conditioned not only upon the fact of residence, but also upon the fact that the claimant is the head of a family; and there are further conditions enumerated in the code which will defeat the right to claim exemptions. To determine whether, in a given case the claimant is entitled to chattel exemptions, often involves the determination of questions of fact touching the status of the claimant; and in some cases his relations to the property claimed as exempt are ⁵⁹⁵ vitally important—as where the action is for the purchase money, or where the property seized was obtained by false pretenses. In all such cases the officer is bound, at his peril, to exercise an official discretion with respect to turning over property demanded as exempt. The officer ought not to turn it over certainly—if indemnified—in cases where, in his judgment, there is serious doubt of the claimant's right to exemptions. We are therefore of the opinion that mandamus ought not to be resorted to as a remedy in this class of cases. It is, of course, elementary that this extraordinary remedy cannot be resorted to as a means of compelling ministerial officers to act in any case where the officer's action or nonaction depends upon the exercise of an official discretion: *High on Extraordinary Remedies*, 2d ed., sec. 80; *Merrill on Mandamus*, sec. 110. In the case at bar, counsel for the appellant contend in argument that the relator's status is such that she is not entitled to exemptions, because, as counsel claim, she is not the head of a family, and because she is a nonresident of this state. It appears by the affidavit of the relator that she is a resident of this state, and that she is a married woman, having two children living with her and dependent upon her for support. But these facts, all and singular, may be controverted, and it cannot be assumed that the proper tribunal will determine them either one way or the other. The creditor has a right to show that the debtor is not entitled to exemptions. Nor can an officer be called upon to settle these important questions of both law and

fact. They are just such questions as devolve upon the officer the duty of exercising an official discretion. For this reason, as has been said, mandamus will not lie to coerce his official action.

Our conclusion is, that the order directing the writ to issue was error, and that said order furnished no legal ground for the entry of a judgment for costs. The order appealed from is reversed, and the district court will be directed to enter judgment in the appellant's favor, dismissing this proceeding, and for defendant's costs and disbursements in both courts.

The other judges concurring.

AN APPEAL FROM JUDGMENT BEFORE ENTRY cannot be taken: *Durant v. Comegys*, 2 Idaho, 809, 35 Am. St. Rep. 267; note to *Davie v. Davie*, 20 Am. St. Rep. 173.

AN APPEAL LIES FROM AN AWARD OF MANDAMUS or an order giving leave to sue out a peremptory mandamus: *Pinckney v. Henegan*, 2 Strob. 250, 49 Am. Dec. 592. As to what orders are appealable, and what not, see notes to *Holloway v. Holloway*, 10 Am. St. Rep. 349; *Davie v. Davie*, 20 Am. St. Rep. 173, 174.

MANDAMUS DOES NOT LIE TO COMPEL A LEVY of an execution by a sheriff: *Habersham v. Sears*, 11 Or. 431, 50 Am. Rep. 481. Mandamus will not issue to a public officer, unless to perform some precise, definite act, or is one of a class of acts purely ministerial, and in respect to which the officer has no discretion whatever: *American Casualty etc. Co. v. Fyler*, 60 Conn. 448, 25 Am. St. Rep. 337. It cannot issue to control the discretion of an officer, except some abuse thereof is shown: *State v. Rickards*, 16 Mont. 145, 50 Am. St. Rep. 476. As to when and when not mandamus will lie, see notes to *State v. Barnes*, 23 Am. St. Rep. 525; *Wood v. Strother*, 9 Am. St. Rep. 257, 258; and for a general discussion of mandamus, see important note to *Dane v. Derby*, 89 Am. Dec. 728-742.

ATTACHMENT—EXEMPTIONS—REMEDY AGAINST OFFICER.—An officer who attaches goods exempt by law from attachment is a trespasser: *Kiff v. Old Colony etc. Ry. Co.*, 117 Mass. 591, 19 Am. Rep. 429. That property attached is exempt from execution may be shown on motion to dissolve the attachment or to have the property released: *Wilson v. Stripe*, 4 G. Greene, 551, 61 Am. Dec. 138. A party having a right of action against a sheriff for attaching exempt property does not lose such right by declaring he did not care for the things taken: *Rice v. Chase*, 9 N. H. 178, 32 Am. Dec. 346. Trespass may be maintained against an officer by the owner of goods wrongfully attached without previous demand or notice: *Tufts v. McClintock*, 28 Me. 424, 48 Am. Dec. 501. Actions for wrongful attachments and defenses thereto are discussed at length in the monographic note to *Burton v. Knapp*, 81 Am. Dec. 467-480; see, also, cases cited in the note to *Weston v. Dorr*, 43 Am. Dec. 264.

GILMAN v. GILBY.

[8 NORTH DAKOTA, 627.]

SALE OR AGENCY.—Delivery of goods by a principal to his agent to be sold by the latter on commission is not a sale of the goods to the agent.

JUDGMENTS—VESTING TITLE IN WRONGDOER.—The mere taking of a money judgment by the principal against his agent for the value of goods wrongfully withheld by the agent does not operate to invest the agent with the title to such goods, or to a warrant issued in payment therefor. To consummate this, payment of the judgment is necessary.

JUDGMENT IN TROVER, VESTING TITLE BY.—A judgment for the conversion of property does not operate to extinguish the owner's title to the property converted and vest it in the wrongdoer, nor does it bar the owner's right to assert title to such property. Such bar arises only upon payment of the judgment.

McDermont & Mayer, for the appellant.

Cochrane & Corliss, for the respondent.

629 YOUNG, J. This is an action to recover upon a township warrant issued by the defendant township in payment for two road machines purchased by it from the Western Wheeled Scraper Company through the latter's agents. The warrant bears date June 26, 1893, is for five hundred dollars, and is payable on its face to Lytle & Martine, who were then the company's agents for the sale of scrapers in this state. The complaint alleges that the warrant in question was transferred for value, and by proper indorsements, first by the payees to William G. Martine, then by the latter to the plaintiff, and that it is unpaid. The defense is, that this warrant belonged to the Western Wheeled Scraper Company, and not to its agents, and that the debt represented by it has been paid, and in this connection the answer alleges that it was issued for the purpose of paying that company for the two scrapers purchased from it by the defendant, and that said warrant was made payable to Lytle & Martine solely in reliance upon their representations that they had authority from their principal to receive payment in that form. Further, that in September, 1895, thereafter, the defendant, acting upon assurances that said warrant had been lost, issued another warrant in lieu thereof for the same amount, but payable to the Western Wheeled Scraper Company, and that this last warrant has been paid. The case was tried in the district court without a jury, and a judgment was ordered **630** and entered dismissing the action. Plaintiff brings the case here for trial anew.

The facts from which the case is to be determined are practically undisputed. That defendant has paid for the scrapers, as alleged, is conceded. It is also clearly established that the title to all scrapers consigned to Lytle & Martine for sale, as well as the gross proceeds of such sales, in whatever form they might be, was in the Western Wheeled Scraper Company. In fact, it is not claimed by appellant that the transaction between the company and its agents amounted to a sale to the latter, or that Lytle & Martine ever had title to the scrapers sold to the defendant. Such a position would not be tenable under such a contract: *Metropolitan Nat. Bank v. Benedict Co.*, 74 Fed. Rep. 182; *Norton v. Melick*, 97 Iowa, 564; *Walker v. Butterick*, 105 Mass. 237; *Sturm v. Boker*, 150 U. S. 313. It is clear, too, that the warrant in suit is not negotiable in the sense of cutting off defenses which might have been made against the original payee: *Goose River Bank v. Willow Lake School Tp.*, 1 N. Dak. 26, 26 Am. St. Rep. 605. The plaintiff has, then, only the rights of Lytle & Martine. It has been shown that they had no title either to the scrapers sold or to the proceeds of sales, and hence did not own this warrant, although it was taken in their name; and consequently they could transfer no title to it. But it is plaintiff's contention that the company waived and lost its title to both the scrapers and proceeds by taking a judgment against such agents for their value, and that by so doing "the company elected to repudiate any interest or ownership that it may have had in them prior thereto, and forever estopped itself from subsequently claiming them as its own." Upon this contention rests plaintiff's whole case. In support of this alleged waiver the plaintiff offered in evidence in rebuttal the judgment-roll in a case entitled "*Western Wheeled Scraper Company v. James E. Lytle and W. G. Martine and Lytle & Martine*," tried in the district court of Hennepin county, Minnesota. This was objected to by defendant's counsel as "incompetent, irrelevant, and immaterial, and not being a judgment between the parties to this action." Pursuant to the requirements of section 5630 of the Revised Codes, as amended by chapter 5 of the Laws of 1897, under which the case was tried, the same was received into the record and is before us upon the same objection. We find no ruling upon the objection, but it is evident that the trial judge did not consider the judgment at all, or at least gave no weight to it as supporting appellant's contention, for it appears in the records before us that he not only found that the warrant here in suit was not the property of Lytle & Martine, and was the

property of the Western Wheeled Scraper Company, but also that said company had never "elected to treat the same as the property of said Lytle & Martine, or estopped itself from claiming title thereto." We think this conclusion of the trial court was correct, and, further, that the judgment-roll offered was not admissible in evidence for the purposes for which it was offered, namely, for the purpose of ⁶³¹ showing a waiver of or estoppel to assert title to the warrant in question in the Western Wheeled Scraper Company. Plaintiff's position is that in the judgment offered in evidence the Western Wheeled Scraper Company had a money recovery against its agents for the very scrapers for which this warrant was given, and that by taking a money judgment it conclusively waived its claim of ownership; in other words, it cannot have a judgment for the value of the goods not accounted for, and assert title to the proceeds of the sale at the same time. An examination of the papers which constitute the judgment-roll discloses that the action was in equity, instituted by the company against its agents for the purpose of obtaining an accounting from them for a large number of machines intrusted to them for sale; also to recover the possession of the specific proceeds of sales made, the warrant here in suit being expressly mentioned; further, to enjoin said agents from disposing of either the machines or proceeds, including this warrant. It appears that such an enjoining order was issued; further, that a receiver was appointed to recover the company's property, and that a large number of machines were taken possession of by the receivers, and delivered to the company, under the order of the court; also that the court found that the title to all property intrusted to said agents, as well as the title to the proceeds, including the warrant in question, was in the company; but this warrant did not come into the hands of the receiver. Thereafter an accounting was made by the court in accordance with the terms of the contract between the company and Lytle & Martine, and a money judgment rendered against the latter for the value of such goods as they had failed to account for, and which the receiver had failed to obtain possession of. Plaintiff contends, too, that by taking this judgment the company elected to treat the transaction as a sale to the agents. We think not. It appears from the papers offered that the company continually asserted its title to the property in question, and was then invoking the aid of the court to secure its possession; further, that the judgment rendered was no more than a judgment for the

value of the property wrongfully withheld by the agents. It certainly is not different from a judgment in conversion, and it is well settled by the great weight of modern authority that a judgment for the conversion of property does not operate to extinguish the owner's title to the property converted, and vest it in the wrongdoer. The common-law rule was undoubtedly the other way, but that was based upon the certainty of redress afforded by that remedy, which could then be enforced by the imprisonment of the debtor's person. It is probable that the present inadequacy of an ordinary judgment and its emptiness as a remedy has contributed to the change in the rule, but, at any rate, the doctrine is well settled now that a judgment for conversion does not bar the right to assert title to the property converted, and that the bar arises only upon payment of the judgment: *Lovejoy v. Murray*, 3 Wall. 1; *Hepburn* ⁶³² v. *Sewell*, 5 Har. & J. 211, 9 Am. Dec. 512; *Smith v. Smith*, 50 N. H. 212; *McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 598; *Mitchell v. Shaw*, 53 Mo. App. 652; *Miller v. Hyde*, 161 Mass. 472, 42 Am. St. Rep. 424; *Sharp v. Gray*, 5 B. Mon. 4; *Morgan v. Chester*, 4 Conn. 387; 1 *Greenleaf on Evidence*, sec. 533; 1 *Freeman on Judgments*, sec. 237; 15 Am. & Eng. Ency. of Law, 347. The judgment offered in evidence showed that it was wholly unsatisfied. It was not admissible, therefore, to show a waiver of title—the only purpose for which it was offered. It developed upon the cross-examination of the plaintiff that legal steps of some nature to get possession of the warrant were taken by the company while it was lodged in one of the banks of Minneapolis. Just what they were we cannot determine, as the evidence is very obscure on that point, but it seems that they were auxiliary to the main action wherein the judgment was rendered to which we have referred. They need not, therefore, be separately discussed.

The judgment of the district court is affirmed.

All concur.

FACTORS.—Goods consigned to a factor for sale remain the property of the consignor, and are not subject to the debts of the factor: *Peek v. Helm*, 127 Pa. St. 500, 14 Am. St. Rep. 865, and note.

JUDGMENT IN TROVER DOES NOT TRANSFER THE TITLE to the property; it remains in the plaintiff until he receives satisfaction: *Miller v. Hyde*, 161 Mass. 472, 42 Am. St. Rep. 424, and important note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**GIBSON v. FIFTH AVENUE AND HIGH STREET BRIDGE
COMPANY.**

[192 PENNSYLVANIA STATE, 55.]

EMINENT DOMAIN—DAMAGES TO SEPARATE PIECES OF PROPERTY.—Where a person owns property abutting on a street upon which a public improvement is being made, and later acquires property adjoining the first piece, but abutting on other streets, which property is used separately and distinctly from the first piece, the two properties will not be considered as one in a proceeding to assess damages for injuries caused by the erection of the public improvement, and damages will be confined to the property fronting on the street upon which the improvement is being made.

E. P. Douglass, J. S. Ferguson, and H. H. Swaney, for the appellant.

Johns McCleave, W. B. Rodgers, and D. T. Watson, for the appellee.

57 WILLIAMS, J. This was a proceeding to recover damages alleged to have been sustained by the plaintiff by reason of the erection of an approach to the defendant's bridge over the Youghiogheny river in the city of McKeesport. The bridge began in Fifth avenue. It was supported for a little distance by a solid pier of masonry occupying twenty-seven feet out of the sixty feet which was the breadth of the street, but as soon as the height of the bridge or approach was sufficient to admit the passage of teams underneath it, iron columns were substituted for the masonry, and the approach was wholly sustained by these columns. Water street and Mulberry alley, which

bounded the plaintiff's property on the east and west, crossed Fifth avenue under the approach, and the elevation in front of plaintiff's property was from about nine feet to near eleven feet above the surface of Fifth avenue. The property which the plaintiff claims to be damaged by the ⁵⁸ building of the approach consists of a lot fronting on Fifth avenue, extending from Mulberry alley to Water street, with buildings thereon opening on Fifth avenue, one or more lots fronting on Water street with three buildings thereon, and one lot fronting on Mulberry alley with a frame house thereon. The lot fronting on Fifth avenue had been owned by her husband in his lifetime. The lots on Water street and Mulberry alley she had purchased subsequently as an investment.

Her right to recover damages done to her Fifth avenue property by the approach is not denied, but her right to recover for her property on Mulberry alley and Water street is seriously disputed; and upon the question so raised the contest was made in the court below at the trial, and is now made here upon this appeal. The purchase and subsequent use of the lots not fronting on Fifth avenue might have made the entire block a single piece of property with a frontage on Fifth avenue, or they might have left them wholly distinct in use, though contiguous, as they were before the purchase of them by the plaintiff. What was the result in this case must depend upon what the purchaser actually did with them after her purchase. If the front building had been a manufactory, and she had purchased the Water street and the Mulberry alley lots to enlarge the capacity of her factory, and so remodeled them and connected them with the original building as to make one business plant of the whole, she could have well insisted that she had changed the use and character of the property she had purchased, and practically and permanently annexed it to her original Fifth avenue property. But the property was dwelling-house property held for rental by its owners before she bought it. It has been held by her for the same uses since she acquired title. She may find it more convenient to supply these houses with water by a connection with her Fifth avenue supply pipes, but this does not change the use of the houses so supplied, or make them any more a single property than if each house had its independent supply connecting directly with the mains.

The defendant company brought the attention of the learned judge to the question they sought to raise by a series of points, in which he was asked to instruct the jury that the plaintiff

could not recover damages for her Water street and Mulberry alley properties, because she acquired and held them "by a ⁵⁹ separate and distinct title" from her frontage on Fifth avenue, and, "because, in point of fact, said property is held, used, occupied, and enjoyed by her separately and distinctly from that portion of her property which fronts upon Fifth avenue aforesaid." This instruction was refused. The jury was in effect told that neither the fact that she held these properties by a distinct and separate title nor the additional fact that "said property is held, used, occupied, and enjoyed by her separately and distinctly" from her frontage on Fifth avenue, could prevent her from treating all her purchases as constituting a single piece of property fronting on the same street. This was a mistake. The evidence fully justified the point. It showed that the use of her dwelling on Water street and Mulberry alley was quite as independent and distinct from that of her property on Fifth avenue as it was before she purchased it, or as it would have been if the title had never passed from the original owners to her. There was no evidence upon which this question should have been submitted to the jury, and its submission was a mistake that requires us to reverse the judgment. The property upon Fifth avenue was injured to some extent by the approach to the bridge, and for this injury her right to recover was clear; but the purchase of property on Water street, or on Mulberry alley, with a view to a rental of such piece of property in the same manner that it had been rented by the former owner, gave her no right to recover damages done to such property beyond that which would have existed if she had never become the owner of it. Upon this question the assignments of error are sustained, the judgment is reversed and a writ of *venire facias de novo* is awarded.

PER CURIAM. The opinion, of which the above is a copy, having been written by Mr. Justice Williams to whom the case was assigned, was read in consultation and approved, but, owing to his sickness and absence, was not filed. The same is now adopted and filed as the opinion of the court.

EMINENT DOMAIN.—DISCONNECTED PROPERTIES, as a rule, are to be treated as separate and distinct in assessing damages for taking a right of way: *Potts v. Pennsylvania etc. R. R.*, 119 Pa. St. 278, 4 Am. St. Rep. 646. But when part of several contiguous town lots, treated as one tract by the owner, is taken for a right of way, in recovering damages he may show the effect of the appropriation on all his land: *Atchison etc. R. R. Co. v. Boerner*, 34 Neb.

240, 33 Am. St. Rep. 637; yet the mere platting of lands into blocks on a map, or the minor government subdivisions over which a road may pass, do not divide land into separate tracts within the meaning of this rule: Note to Pennsylvania Co. v. Pennsylvania etc. R. R. Co., 151 Pa. St. 334, 31 Am. St. Rep. 762.

SCRANTON GAS AND WATER COMPANY v. NORTHERN COAL AND IRON COMPANY.

[192 PENNSYLVANIA STATE, 80.]

EMINENT DOMAIN.—A FRANCHISE IS PROPERTY, and, as such, may be taken by a corporation having the right of eminent domain.

EMINENT DOMAIN—TAKING PROPERTY ALREADY DEVOTED TO A PUBLIC USE.—To justify the taking of a franchise by a corporation having the right of eminent domain, the necessity must not be simply a question of economy or convenience, but must arise from the very nature of things, and be so absolute that, without it, the grant itself will be defeated.

EMINENT DOMAIN—RAILROAD TAKING LAND OF GAS COMPANY.—A railroad company will not be permitted to condemn for an additional track a portion of the land of a gas company necessary for the latter's present and future use, where such taking is merely for the convenience and economy of the railroad company.

Everett Warren, D. T. Watson, Alfred Hand, and William J. Hand, for the appellant.

James H. Torrey and George R. Bedford, for the appellee.

92 STERRETT, C. J. In its decree, the learned court below continued the injunction theretofore awarded as to the greater part of the lot described in the bill, and dissolved the same as to the residue of said lot. This appeal is from so much of the decree as releases said residue from the operation of the injunction.

Among other things, the bill in substance avers that under its right of eminent domain, the plaintiff company took possession of the lot forty feet front on Mechanics street by one hundred and fifty feet in depth, being lot No. 2 in block 19 on the town plat of the city of Scranton, on which it erected, for the purposes of its business, a building sixty feet front by one hundred and twenty feet in depth, which it has continuously used for the purposes of its business; that the use of said lot is absolutely necessary to the business in which plaintiff is engaged, viz., furnishing the city of Scranton and the inhabitants there-

of with a supply of pure gas; that its plant for the manufacture of gas, erected at an expense of over two hundred thousand dollars, is located on adjoining lots, and is separated therefrom only by the present right of way of the defendant company, and that said property, including the lot above described, is absolutely necessary for the supplying of gas to the public, and has so been used without let or hindrance thirty years and upward last past; that the defendant company has instituted proceedings on the law side of the court for the purpose of taking possession of said lot No. 2, etc.; and this is followed by a denial of the defendant's right to take said property, and a prayer for an injunction, etc.

On the coming in of the answer, etc., the case was referred to a master, who found substantially the following facts: Defendant's railroad extends from the city of Wilkes-Barre, through the city of Scranton, to Green Ridge in Lackawanna county, a distance of over twenty miles, and is a connecting link between ³³ the Wyoming region of the anthracite coal field and the railroad system of the Delaware and Hudson Canal Company in the state of New York. An average of twenty-four passenger and seventy freight and coal trains pass over defendant's road daily, and, by reason of its constantly increasing traffic, its whole line has been double tracked, except for a distance of about five hundred feet extending through lot No. 2 of plaintiff's gas plant. This line of single track runs for some distance, in a measure parallel with the Lackawanna river, on the lowlands lying southeasterly along said river, and at the foot of a steep bluff, rising from the interior curved line of the right of way of the railroad from twenty to thirty feet, and bounding on the northwest a plateau on which a built-up portion of the city of Scranton is located. The line of defendant's railroad, including the single track, may be said to describe a half circle, with a base of about fifteen hundred feet. Lying between this track and the river is the main plant of plaintiff's gasworks.

On the hearing, plaintiff introduced evidence to show the practicability of completing defendant's double-track system without appropriating lot No. 2 aforesaid, or any part of it. Three methods were proposed: (a) The construction of a tunnel underneath the plateau, and in the neighborhood of the base line of the half circle described by the present track; (b) By the construction of an additional track for a distance of sixteen hundred or seventeen hundred feet, diverging from the present track in such manner as to avoid lot No. 2, leaving

it between the tracks; and (c) By the construction of two tracks, substantially on the same line as that last indicated, by abandonment of the present track and right of way through plaintiff's land, and the taking of a sufficient strip from lot No. 2 on the side farthest from the gasworks proper, and thus running lot No. 2, so to speak, up against plaintiff's present land, and leaving lot No. 2, as thus moved, untouched.

The master reported that "the tunnel route (a) is impracticable by reason of its expensiveness, as well as engineering difficulties." After considering the methods of the other two routes proposed by plaintiff, and the attending difficulties, he concludes thus: "While the defendant might operate its railroad after the completion of either the (b) or (c) method of accomplishing its double-track system, yet the occupancy of lot ⁹⁴ No. 2, for that purpose, by placing thereon an additional track immediately adjoining its present single one, as proposed by it at the time of filing this bill, is, from an engineering standpoint, both as regards construction and subsequent use by defendant, the most practicable and feasible method; and, in addition to this consideration, the defendant would be thereby saved, in the item of construction alone, an expenditure of sixty-two thousand dollars, as already indicated; and the use of Bridge and Scranton streets as public highways at their present grades would better subserve the needs of public travel."

The master does not find that a double track at the point in question is imperatively necessary to the defendant company's business, and, while he might possibly have so found from the evidence, it is quite apparent from his conclusions above quoted that there exists no necessity that impels defendant to take plaintiff's land for its additional track. It is simply a question of economy or convenience, or both combined. This is not sufficient to justify the taking of property which has heretofore been acquired under the right of eminent domain and for many years devoted to public use by another corporation. As was said by Mr. Justice Gordon in *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 159: "It is true that a franchise is property, and, as such, may be taken by a corporation having the right of eminent domain, but, in favor of such right, there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control. It may not be a necessity created by the company itself for its own convenience or for the

sake of economy. To permit a necessity such as this to be used as an excuse for the interference with, or extinction of, previously granted franchises would be to subject these important legislative grants to destruction on a mere pretense, in fact at the will of the holder of the latest franchise."

After reciting the above quotation, Mr. Justice Paxson, in *Pittsburg Junction R. R. Co.'s Appeal*, 122 Pa. St. 511, 9 Am. St. Rep. 128, employed language especially applicable to the case at bar: "The location claimed for the defendant is a matter of economy, not of necessity. It can construct its road and reach its terminus by another route. It is true it would be expensive, but it is a ⁹⁵ mere question of money and engineering skill. It is not entitled to run through plaintiff's yard and cripple its facilities for handling its business, merely to save money." In *Sharon Ry. Co.'s Appeal*, 122 Pa. St. 533, 9 Am. St. Rep. 133, the same learned justice, reiterating the same principle, says: "It is settled law and rests upon sound principles." The same principle is reaffirmed in *Groff's Appeal*, 128 Pa. St. 633, and again in *Perry County R. R. Extension Co. v. Newport etc. R. R. Co.*, 150 Pa. St. 200.

It may not be amiss to say that there is nothing new or exceptional in the rule that the test of the power to take by implication is "a necessity so absolute that without it the grant itself would be defeated." Implied powers in all cases rest on this basis. Any other rule would be subversive of the law of corporate authority. The rule relating to the appropriation by one corporation of land already dedicated to public use by another corporation, and necessary for the proper exercise of its corporate functions, is too firmly established on both principle and authority to be seriously questioned.

Before this bill was filed, the defendant company had instituted proceedings at law to condemn the whole of said lot No. 2. This was an assertion of the necessity of the whole for its corporate purposes; and the answer filed in this case reiterated that claim. At the close of the hearing before the master, the defendant, in the language of the master, admitted, "that it was sufficient for the construction and operation of the additional track that it should take no more than a strip of said land (lot No. 2) twelve feet wide and parallel with its existing right of way," and "specified as the quantity of plaintiff's land which it was necessary and essential for the purposes of the defendant, a strip east of defendant's present track, whose center line

shall be parallel with and twelve feet to the east of the center line of its present track, leaving an open space to the east of the center line of such additional track, equal to the space between the center line of its present track and the land or building of the plaintiff company." While it may be conceded, as before stated, that this amount of land finally claimed may be reasonably necessary to the defendant for its corporate purposes, it is certainly plain that there is no such necessity as would justify it in taking it from the plaintiff.

¶ These considerations are sufficient to dispose of the controlling questions in this case; but a few words on another branch of the case may not be amiss, viz., the necessity of the whole of lot No. 2 for plaintiff's corporate uses. The master found that said lot was devoted by plaintiff to public uses, and "that the use was not merely incidental or casual or as a matter of accommodation in the operation of its plant"; but he further found that it was not an essential part of plaintiff's plant. On exceptions to his report, the learned judge of the court below disagreed with the master's conclusions, except as to the strip twelve feet wide, and he accordingly dissolved the injunction as to that strip and made it perpetual as to the residue of lot No. 2. The findings of facts and his reasoning thereon should have led him to the logical conclusion that the injunction should be made perpetual as to the whole of the said lot No. 2. It appears to us that the learned court below attached too much importance to the immediately present needs of the parties, and not enough to their future needs. Our consideration of the evidence has led us to the conclusion that it presents a much stronger case in plaintiff's favor than appears in the opinions of the master and the court below. Defendant's expert witness, Byrne, in his examination in chief, speaking of the value of lot No. 2, said: "Restricted as they are for ground there, it might be of more than ordinary value to the gas company." He also admitted that on account of the conformation of the ground of lot No. 2, the expense of a retaining wall would be enough to prevent the use of the lot for building purposes after the strip twelve feet wide was taken off. The witnesses substantially agree that the cost to the plaintiff in rearranging the gas plant in accordance with the defendant company's suggestion would equal, if not exceed, the additional cost to the defendant of adopting one of the alternative routes that would not injure the plaintiff company. There are also grave doubts whether the plans suggested on behalf of the defendant are

either feasible or safe. But it is not our purpose to discuss the evidence. Enough has been said to show that the learned court below erred in not making the injunction perpetual as to the whole of said lot No. 2.

The decree of the court below is accordingly reversed and set aside; and it is now adjudged and decreed that the defendant ^{or} company, its agents, workmen, servants, and employes be, and they are hereby, severally enjoined forever from entering upon or taking possession of plaintiff's lot No. 2, described in the bill, or any part thereof, and also from laying railroad tracks thereon, or in any manner obstructing the plaintiff company in the free use and enjoyment thereof; and it is further ordered that the defendant company pay all the costs, including the costs of appeal.

EMINENT DOMAIN.—PROPERTY ITSELF DEVOTED TO A PUBLIC USE may be taken under the power of eminent domain: Note to Appeal of Sharon, 9 Am. St. Rep. 139, 142; but authority to appropriate it must be conferred in express terms or arise from necessary implication: Little Nestucca etc. Co. v. Tillamook County, 31 Or. 1, 65 Am. St. Rep. 802, and note. Property of a corporation including its franchise may be taken if the public exigencies require, though such taking leaves nothing for the corporate powers to act upon: Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466. If both uses may not stand together, and the latter must supersede the former, in order to authorize an appropriation of land already dedicated to a public use the legislative intent to that effect must unequivocally appear; it cannot be inferred from a grant of power in general terms: Note to Appeal of Sharon, 9 Am. St. Rep. 143. For instances of appropriating property already devoted to a public use, see Toledo etc. Ry. Co. v. Detroit etc. R. R. Co., 62 Mich. 564, 4 Am. St. Rep. 875; In the matter of Mayor etc. of New York, 135 N. Y. 253, 31 Am. St. Rep. 825; Cincinnati etc. Ry. Co. v. Anderson, 139 Ind. 490, 47 Am. St. Rep. 285.

WHEELAND v. ATWOOD.

[192 PENNSYLVANIA STATE, 237.]

INSURANCE—LIFE—ASSIGNMENT OF POLICY.—If a life insurance policy is in its inception a good faith policy, made for a legitimate, and not a speculative, purpose, it is assignable to anybody for a proper and lawful consideration.

INSURANCE—LIFE—INSURABLE INTEREST.—A HUSBAND has such an insurable interest in the life of his wife that the assignment to him of a policy taken out in her name gives him a good absolute title thereto which he might dispose of for a lawful consideration; hence he may assign the same to his creditor in payment of his debt.

INSURANCE—LIFE—INSURABLE INTEREST.—A CREDITOR may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt with interest, and the cost of such insurance, with interest thereon during the period of the expectancy of life of the assured according to the Carlisle tables.

John J. Reardon and Henry C. Parsons, for the appellant.

C. La Rue Munson, Otto G. Kaupp, and Addison Candor, for the appellee.

²³⁸ GREEN, J. Under the assignment of the policy in question by Mrs. Atwood to her husband, Clarence Atwood, he became the absolute owner of the policy. In 1896 he was indebted to Daniel A. Fessler in the sum of about \$1,900. Being unable to continue the payment of the premiums, according to the testimony, and desiring to pay all the debt he owed to Fessler, he made an absolute assignment of the policy to Fessler, who paid the subsequent premiums accruing on the policy. There was nothing whatever in the testimony impugning the integrity of the transaction, or showing or tending to show that it was a speculative transaction upon the life of Mrs. Atwood; on the contrary, it was the undisputed evidence that it was an assignment of the policy made for the purpose of paying the debt as far as it could, which the assignor owed to the assignee, and the policy itself in its original inception was a good faith policy made for a legitimate, and not a speculative, purpose, and for that reason was assignable to anybody for a proper and lawful ²³⁹ consideration. The interest of the husband in the life of his wife validated the policy, and her assignment of it to him gave him a good absolute title to it which he might dispose of for a lawful consideration, especially when he was no longer able to pay the premiums and could pay an honest debt with it. It was shown by the testimony of the agent of the life insurance company that Mrs. Atwood's expectancy of life at the time the policy was issued was twenty-five and ninety-nine one-hundredths years, and that the amount of premiums that Fessler would have been obliged to pay if she had lived out her expectancy would have been about \$4,500. As the policy was for \$5,000, Fessler would have been a considerable loser in money if Mrs. Atwood had lived the full period of her expectancy. These facts bring the case within the ordinary class of cases of insurances by creditors upon the lives of their debtors, which are constantly sustained by the courts.

In *Grant v. Kline*, 115 Pa. St. 618, such a policy was sustained. A debtor owed his creditor \$743, and a policy was

issued to the creditor at the instance of the debtor upon the life of the debtor for \$3,000. The debtor died within a year after the policy was issued, and the insurance company paid the amount of the policy to the creditor as assignee of the policy. The administrators of the assured brought an action to recover all the money after the debt due the creditor and the premiums paid by him with interest had been deducted. It was contended there, as here, that the policy was a wagering policy and that the creditor had no insurable interest in the life of the debtor, but the court below, and this court, held otherwise, and decided that it was not a wagering policy, that it was a perfectly valid transaction, and that the discrepancy between \$743, the amount of the debt, and \$3,000, the amount of the policy, was not so great as to invalidate it as a wagering policy. In *Corson's Appeal*, 113 Pa. St. 438, 57 Am. Rep. 479, a policy was obtained by a creditor upon the life of his debtor, who was his aunt. The debt was about \$500 and the policy was for \$2,000. We held that the relationship was not close enough to sustain the policy on that ground, but that as creditor there was an insurable interest which was sufficient for that purpose. Clark, J., delivering the opinion, said: "So, also, a creditor has an insurable interest in the life of his debtor": Citing a number of cases. "In the case at bar, ²⁴⁰ the policy was \$2,000, the amount of the indebtedness was at that time undetermined, and therefore uncertain; it is since ascertained to have been between \$500 and \$750. Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulation from interest, we could not say the transaction carries with it any inherent evidence of bad faith. The essential thing is, as stated by the learned judge of the court below, that the policy should be obtained in good faith, and not for purposes of speculation upon the hazard of a life, in which the insured has no interest. The case is materially different from *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570, the principles involved in that case are not drawn in question here."

But a still more emphatic illustration of this doctrine occurred in the case of *Ulrich v. Reinoehl*, 143 Pa. St. 238, 24 Am. St. Rep. 534. There the debt was \$99.51, and the policy was for \$3,000. The policy was taken out by the debtor in his own name and was immediately transferred absolutely to the creditor. The creditor paid all the premiums until the death of

the debtor, which occurred in 1881, about four years after the date of the policy. An action was brought by the executor of the will of the deceased debtor against the creditor who had received the whole of the insurance money, to recover the difference between the amount of the debt and premiums with interest and the amount of insurance. The court below submitted to the jury the question whether the transaction was speculative and wagering, or done with an honest intent to obtain payment of the debt. The jury found that it was done with an honest and not a speculative intent. The court charged that all the circumstances should be considered, the age of the insured, his condition of health, the probable amount required to be paid by the creditor, and then that the jury should inquire "whether, considering all those matters, the amount of insurance taken out to protect that debt was so disproportionate as to make the policy a wagering or speculative policy. If the jury find that it was not, that it was properly proportionate, fairly calculated to protect the debt, and no more, then the verdict must be in favor of the defendants." It had been testified on the trial that, if the insured had lived out his expectancy, the total amount of assessments which the creditors ²⁴¹ would have paid would be \$2,436.13, which with interest added would have amounted to \$4,336.31. Upon appeal to this court we sustained the ruling, and, after an elaborate discussion of the whole subject, in which the matter was considered in all its aspects, and the necessity for adopting a fixed and uniform rule for all cases was stated, we said: "We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt with interest, and the cost of such insurance, with interest thereon during the period of the expectancy of life of the assured according to the Carlisle tables."

In the present case, the assured was forty-three years of age at the date of the policy and had an expectancy of almost twenty-six years. The amount of premiums to be paid with interest thereon would be at the end of the expectancy about \$4,500, which, being added to the debt, \$1,900, and interest thereon, would result in a large loss to the creditor. In the case of *McHale v. McDonnell* this rule was again asserted and followed. The debt was \$700 and the policy was \$2,000. Our Brother McCollum, delivering the opinion, said: "In this case there was no evidence showing what the assured's expectancy of life was when the policy was issued or when it was assigned.

There was nothing, therefore, in the disproportion between the amount of the policy and the alleged consideration for the assignment of it which would have warranted the court or jury in denying to the plaintiff a recovery in accordance with his intention. *Grant v. Kline*, 115 Pa. St. 618, was not overruled by *Ulrich v. Reinoehl*, 143 Pa. St. 238, 24 Am. St. Rep. 534, or by *Shaffer v. Spangler*, 144 Pa. St. 223."

The foregoing decisions entirely dispose of the present contention. *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570, and its following cases are not applicable. They do not raise the same question. The case of *Wegman v. Smith*, 16 Week. Not. Cas. 186, has no analogy to this. That was a mere speculative policy on the life of Mrs. Smith, and was immediately turned over to Smyser, who paid \$5 for it. There was no bona fides whatever in it. It was a mere wagering policy which was made in the name of the husband to give it a seemingly lawful character, and it was transferred at once to one who had no interest in the life of either the husband or the wife.

²⁴² For the reasons stated we are of opinion that the common pleas was correct in its judgment in this case, and the decision of the superior court was erroneous.

The judgment of the superior court is reversed and the judgment of the common pleas affirmed.

INSURANCE, LIFE.—A CREDITOR MAY INSURE HIS DEBTOR in an amount sufficient to cover the debt with interest, and the cost of insurance with interest thereon during the period of expectancy of life according to the Carlisle tables: *Ulrich v. Reinoehl*, 143 Pa. St. 238, 24 Am. St. Rep. 534, and note.

INSURANCE, LIFE.—A HUSBAND HAS AN INSURABLE INTEREST in the life of his wife: Note to *Keystone Mut. Ben. Assn. v. Norris*, 2 Am. St. Rep. 574.

INSURANCE, LIFE—ASSIGNMENT.—A life insurance policy is a chose in action and may be assigned: *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335; note to *Curtiss v. Aetna Ins. Co.*, 25 Am. St. Rep. 123; it is assignable like any other chose in action: Note to *St. John v. American etc. Ins. Co.*, 64 Am. Dec. 531. As to the validity of an assignment to one having no insurable interest, see note to *Equitable Life Ins. Co. v. Hazlewood*, 16 Am. St. Rep. 906-908.

ESTATE OF GLEESON.

[192 PENNSYLVANIA STATE, 279.]

BONDS—LIABILITY ON.—THE OMISSION OF ONE OF SEVERAL OBLIGORS in a bond to join in the execution of the bond, although named as an obligor in the body of the instrument, is no defense to the obligors who did sign.

APPEAL BONDS—DAMAGES RECOVERABLE—DETENTION OF REAL PROPERTY.—The obligors on an appeal bond given in an ejectment case in the federal courts are liable for all damages arising from the use and detention of the property pending the appeal, including the loss of rents.

REAL PROPERTY—RECOVERY IN EJECTMENT—SET-OFF FOR IMPROVEMENTS MADE PENDING APPEAL.—One who makes improvements on land after an action has been brought to try title thereto cannot claim compensation for their value, whether such improvements are new and capable of being removed or consist merely of repairs.

John T. Greene, for the appellant.

N. Dubois Miller and Biddle & Ward, for the appellee.

282 GREEN, J. This court has so frequently decided that the omission of one of several obligors in a bond to join in the execution of the bond, although named as an obligor in the body of the instrument, is no defense to the obligors who did sign, that the question must be considered settled. In *Keyser v. Keen*, 17 Pa. St. 327, the action was brought against one of six obligors as named in the bond, though five only had signed, and the instrument was a bond of indemnity to indemnify the obligee against loss for having become surety for a deputy sheriff on his bond to the sheriff. The bond contained an admission that the obligee had become surety for the deputy, on the promise of the six to indemnify him against loss by reason of his suretyship. It was claimed for the surety sued that he was not liable because he signed upon the faith that all were to sign, but we said, *Lowrie, J.*: "This bond was prepared for six obligors and is executed by only five of them; yet we cannot, therefore, infer that it is incomplete and not binding on those who did execute it. . . . The bond declares that the plaintiff below had become surety for another person, on the promise of the six persons named in it that they would indemnify him. This is an admission by the five who executed the bond that they were jointly bound to indemnify the plaintiff; and although they do allege that another person agreed to become bound with them, yet, when we find their bond in the hands of the plaintiff, it is

impossible to imply that it was not intended to bind them to ²⁸³ their admitted duty. The refusal of one of the six to join in the bond did not discharge the others from their promise."

This ruling was repeated in *Grim v. School Directors*, 51 Pa. St. 219, *Simpson v. Bovard*, 74 Pa. St. 351, and *Whitaker v. Richards*, 134 Pa. St. 191, 19 Am. St. Rep. 684.

There was no evidence in the present case that it was the agreement of the parties that the bond was not to be binding upon any unless it was signed by all, and, as it was duly delivered and found in the proper custody where it belonged as a fully executed instrument, it was an undoubtedly valid instrument as to all who did sign. We have not been referred to a single contrary decision.

The verdict in the ejectment case was rendered on April 26, 1896, and the appeal from the judgment on the verdict was taken on May 14, 1896, and on May 16, 1896, the appeal bond was filed. The appeal was quashed by the supreme court of the United States on March 17, 1898, and in the present proceeding on the settlement of the estate of Daniel Gleeson, deceased, who was one of the bondsmen on the appeal bond, the claim is made by the plaintiff in the ejectment, to recover damages for the loss of rental of the lands in question during the pendency of the appeal in the supreme court from May 12, 1896, to March 17, 1898. The bond was given in pursuance of rule 29 of the supreme court of the United States, which in real actions gives damages "for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal." The condition of the bond is that it is to be void if the appellants "shall prosecute the said writ to effect and answer all damages and costs if they fail to make their plea good."

It cannot be doubted that under this bond the obligors were bound to respond for all damages arising from the use and detention of the property pending the appeal. Some contention was made in the court below and is made here to the effect that no damages can be recovered on appeal bonds given in ejectment cases for the use and detention of the property pending the appeal, in consequence of the decision of the supreme court of the United States in *Kountze v. Omaha Hotel Co.*, 107 U. S. 378. But while the whole subject was exhaustively discussed in the opinion in that case, and it was held ²⁸⁴ there could be no recovery for use and detention of the property pending the appeal, the decision was put upon the express

ground that the case in which the bond was given was not an ejectment for the land, but a foreclosure proceeding on a mortgage. In this latter class of proceedings it was held the land is not the subject of the controversy; it does not belong to the mortgagee, but to the mortgagor, and he has a lawful right to continue in possession until the final termination of the case. But in ejectment for the land the plaintiff claims the land itself, because it belongs to him, and he is wrongfully deprived of its possession. Hence the mere continuance of the use and possession after verdict is a wrong to the plaintiff who has recovered a verdict and judgment, and is a just cause for damage for which he is to be paid. This distinction is carefully drawn in the opinion, and the decision is therefore inapplicable to the present case, which is an ordinary ejectment for the recovery of the land itself. There is nothing in conflict with this in *Roberts v. Cooper*, 19 How. 373. That was only an application for additional security on a bond in error, and the supreme court held they had not power to interfere with the court below in fixing the amount of the bond. We are very clear that in the present case there was a right in the plaintiff in the ejectment suit to recover damages for the use and detention of the land pending the appeal.

It was further contended for the appellant that there could be no recovery for the detention of part of the land, because the plaintiff in the ejectment had leased it to Frederick Black, one of the defendants, who paid her rent for it. But the fact was that the lease to Frederick Black was made in March, 1894, and terminated in March, 1895, which was a year before the appeal bond was given, and that he never had possession under that lease while the appeal was pending, and never paid a dollar of rent to the plaintiff for any part of the land during the pending of the appeal. He distinctly testified that he never obtained possession of the land under the lease, and he also testified as follows respecting that lease: "Q. This lease expired in March, 1895, did it not? A. Yes, sir; she never had possession of it. Q. And you never got possession under this lease? A. Not of the entire tract. Q. And you never felt justified in paying the rent which was agreed to be paid under ²⁸⁵ this lease, did you? A. No, sir. Q. And this lease terminated, as I say, in March, 1895, prior to the appeal being taken? A. Yes, sir. Q. And from that time until the day when the marshal put the plaintiff in possession of the land, you never paid any rent at all? A. Not to my knowledge, no, sir, or to Mrs. Mary K. L. Black."

There was no testimony in contradiction of the foregoing, and it is very evident that the claim of the appellee is not subject to any deductions on account of any rents received from Frederick Black.

The only remaining matter to be considered is a claim for the value of improvements which, it is alleged for the appellant, were put upon the land by the defendants in the ejectment case while they were in possession. There were two of these improvements for the value of which claim was made. One was a new frame house built by Daniel N. Black, one of the defendants in the ejectment case, which he testified cost him thirteen hundred dollars. But he also said it was built on piles so that it could be removed, and he expected to remove it whenever he left the land. The other improvement was the repair of an old house so as to make it habitable. It was done by Daniel Black's mother for her own use, and it cost one thousand dollars. This was, of course, permanent, and would remain with the land. It was built, however, in 1897, after verdict and judgment in the ejectment case, and while the appeal was pending. The court below decided that no allowance could be made for either of these improvements, and the authorities are certainly that way. The general rule applicable in this class of cases is, perhaps, best stated in *Morrison v. Robinson*, 31 Pa. St. 456, thus: "But one who forcibly dispossesses another and makes such improvements, or one who makes them after action brought to try the title, can have no claim to have his improvements estimated; because he has no right to choose the mode of improvement of another man's property against his known will, and justice will not compensate him at the hazard of doing wrong to the owner." In *Wilkinson v. Pearson*, 23 Pa. St. 117, it was held that it was not error to refuse to receive evidence on the trial of an ejectment that valuable improvements had been made by the defendant in possession since the trial of a former ejectment for the same premises. In *Steele v. Spruance*, 22 Pa. St. 256, the same ruling was ²⁸⁶ made in a case in which the improvements were made after the verdict in an ejectment.

But a still more serious objection to any allowance for these improvements is that, so far as the mother is concerned, she simply made a necessary repair to an old building so that she could live in it. The other house which was previously occupied had burnt down and was not rebuilt. The old one that was repaired was simply used in its place.

It is very clear to us that no allowance can be made for these expenditures by way of abatement from the amount to which the plaintiff in the ejectment suit was entitled, as damages for use and detention, and hence no error was committed by the learned court below in refusing to abate the claim upon the present fund. There is no question as to the correctness of the computation of damages by the court below, and hence it is not discussed. The assignments of error are all dismissed.

The decree of the court below is affirmed and appeal dismissed at the cost of the appellant.

BONDS.—THE OMISSION OF SOME OF THE OBLIGORS named in the body of the instrument to sign does not necessarily invalidate it as to those who do sign: Note to Weir v. Mead, 40 Am. St. Rep. 52; nor does the omission of the names of the sureties in the introduction of the bond affect its validity where they each seal and sign it: Note to Howell v. Alma Milling Co., 38 Am. St. Rep. 704.

EJECTMENT—COMPENSATION FOR IMPROVEMENTS.—A bona fide occupant of land, believing himself to be the owner, is entitled to be paid for improvements made after, as well as before, the commencement of an action by which he is evicted: Whittedge v. Wait, Sneed, 335, 2 Am. Dec. 721, and note. On this question see notes to Jackson v. Loomis, 15 Am. Dec. 349-354; Barrett v. Stradl, 9 Am. St. Rep. 805, 806.

ASSIGNED ESTATE OF TAYLOR.

[192 PENNSYLVANIA STATE, 804.]

CONTRACTS — GAMBLING—DEALING IN STOCKS.—A purchase of stock for speculation is a mere wager on the rise and fall of prices, and hence a gambling transaction, if there was not, under any circumstances, to be a delivery as part of and completing a purchase.

CONTRACTS—GAMBLING, WHEN NOT.—A PURCHASE OF STOCK for speculation, made in good faith and contemplating actual delivery, is not a gambling transaction, and delivery may be postponed or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation.

CONTRACTS—GAMBLING—SALE OF STOCK.—An agreement for an actual sale and purchase of stock will make the transaction valid, though it originated in an intention merely to wager.

John G. Johnson and Henry C. Todd, for the appellant.

Richard C. Dale and C. Berkley Taylor, for the appellees.

306 MITCHELL, J. It has been settled by this court so often that it ought not to require reiteration that dealing in

stocks, even on margins, is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise, or sell "short" to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, Did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a year and then sold, no one would call it gambling, and yet it is just as little so if he had it but an hour and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock, but which he undertakes to get for you, is selling ³⁰⁷ "short," but he is not gambling, because, though delivery is to be in the future, the sale is present and actual. The true line of distinction was laid down in *Peters v. Grim*, 149 Pa. St. 163, 34 Am. St. Rep. 599, and has not been departed from or varied: "A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A and borrows the money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B as security for the money. So, if instead of borrowing the money from B, a third person, he borrows it from A, or, in the language of brokers, procures A to 'carry' the stock for him, with or without margin, the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase or delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices, but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation." This has been uniformly followed: *Hopkins v. O'Kane*, 169 Pa. St. 478; *Wagner v. Hildebrand*, 187 Pa. St. 136. And the rule goes so far that an agreement for an actual sale and purchase will make the transaction valid though it originated in an intention merely to wager: *Anthony v. Unangst*, 174 Pa. St. 10.

Turning now to the facts of the present case, it is clear that

the law was not correctly applied by the auditor and the court below. The brokers made an assignment on December 21, 1895, on which day they held certain stock for appellant, which they had bought on his order, and he had certain other stock which they had sold on his order, but which he had not yet delivered to them. He desired to close the account, complete the mutual deliveries, and receive the balance which the transactions left in his favor. He was entitled to do so, even if the transactions were wagering; the agreement of the parties to make the sales actual would, under *Anthony v. Unangst*, 174 Pa. St. 10, have made them valid. It is true the settlement was not actually made until January 10th, but it was made as of ³⁰⁸ December 20th, the day before the assignment, and the auditor reports that there had been no change of values meanwhile. The time of striking a balance on the books and delivering the stock was not important. Delivery is not in itself a material fact. Its only value is as evidence of the intent to make a bona fide sale. If such is the intent, the delivery may be present or future without affecting validity.

But there was no sufficient evidence that the transactions were illegal at any time. The auditor reports that "the stocks ordered to be bought or sold by the customers of L. H. Taylor & Co. were, as shown by their books, actually bought and sold, and, as this evidence is uncontradicted, I must and do so find. . . . Thus, so far as L. H. Taylor & Co. were concerned, the transactions were not fictitious, but were actual purchases and sales of stock." This finding should have been a warning to caution in taking a different view of the appellant's position in the transactions. It is true the purchase or sale may be actual on part of the broker and merely a wager on part of the customer (see *Champlin v. Smith*, 164 Pa. St. 481), but there should be at least fairly persuasive evidence of the difference. There is none here. The transactions covered by the account began with a small cash balance to appellant's credit, followed by an order to buy two hundred shares of Wabash common, which were bought by the brokers, paid for by appellant, and delivered to him. The close, two years and a half later, showed, as already said, a large number of shares in the hands of the brokers, bought for appellant, and of which he demanded delivery, and other shares sold for him and which he had in his possession ready to deliver. As to the intermediate transactions, appellant testified: "It was always the intention to buy the stocks out and out and pay for them, and I had money to do it with." In the face of

these facts and this uncontradicted testimony, the auditor found that "the account, including his enormous short sales, has all the earmarks of a gaming transaction and I so find it." This was a mere inference, unwarranted by the account itself, and wholly opposed to all the evidence in the case.

Judgment, so far as it relates to appellant's claim, reversed and claim directed to be allowed.

THE DOCTRINE OF THIS CASE was followed in the subsequent cases of Taylor's Assigned Estate, 192 Pa. St. 309, and Taylor's Assigned Estate, 192 Pa. St. 313. In the former case, the court, in sustaining the transaction in question as not a gambling contract, said: "A man may speculate by buying and selling upon expectation of the rise or fall of the market, and he is not thereby gambling. Whether he dealt for that purpose or for investment, and whether he held his purchases an hour, or a day, or a year, are wholly immaterial except as evidence. The test is whether he bought and sold, and not merely settled on differences with no intention at any time of taking his purchases or delivering his sales. That, and that only, is gambling." In the latter case, it was held that where a customer or a broker elects to treat a transaction in stocks as a purchase, and to settle his account on that basis, the transaction is valid, whatever may have been its original character.

A CONTRACT FOR THE FUTURE DELIVERY OF STOCKS in which an actual delivery is not contemplated, but only a payment of the difference between the contract price and the value at the date of delivery, is a mere wagering contract, which will not support an action. But if the transaction has been completed, and another collateral thereto grows out of it, founded upon a new consideration, the new contract may be enforced: *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787; *Oliphant v. Markham*, 79 Tex. 543, 23 Am. St. Rep. 363; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390.

CONTRACTS NOT GAMBLING.—The fact that speculation is the object of a contract for sale is not material to its validity, if the parties in good faith intend an actual purchase and sale; and although parties make an illegal contract, they are at liberty to enter into another in relation to the same subject matter as though no former contract existed, but the new contract must in no sense be a continuation of the old: *Note to Crawford v. Spencer*, 1 Am. St. Rep. 761, 762. See this note, pages 752-766, for a general discussion of contracts to deal in futures; also, note to *Sondheim v. Gilbert*, 10 Am. St. Rep. 33, 34.

COMMONWEALTH TITLE INSURANCE AND TRUST
COMPANY v. ELLIS.

[192 PENNSYLVANIA STATE, 321.]

MORTGAGE—PURCHASE MONEY.—Where the delivery of a deed to the mortgagor and a delivery of the mortgage to the mortgagee are concurrent and simultaneous acts, and the money for which the mortgage was given was in actual fact a part of the purchase money paid for the property, such mortgage is a purchase money mortgage, and is entitled to priority in distribution.

MORTGAGE—PURCHASE MONEY—CHARACTER DISCLOSED ON ITS FACE.—A lien, whether it be a mortgage or a judgment, need not disclose on its face that it is for purchase money, if, in point of fact, it was given for purchase money.

MECHANIC'S LIEN—COVENANT AGAINST—REPUGNANT CLAUSES.—A clause in a building contract positively prohibiting all liens is valid, and is not repugnant to a further clause requiring the contractor to show by sufficient evidence that the premises are free of all liens before payments could be demanded, this latter clause being inserted only as a protection against possible liens which might be filed without regard to the contract.

CONTRACTS—REPUGNANT CLAUSES.—Where the written and printed portions of a contract are repugnant to each other, the printed form must yield to the deliberate written expression.

MECHANIC'S LIEN—COVENANT AGAINST—WHO MAY FILE.—Under a clause in a contract which provides that no liens shall be filed "by any subcontractors, or any other person," the principal contractor is not entitled to file a lien.

It appeared from the evidence that on March 1, 1893, the defendant took legal title to the property by a deed from the owner, Du Pont, dated January 31, 1893, and contemporaneously delivered a bond and mortgage to the plaintiff, dated February 27, 1893, for ten thousand dollars, that sum being needed and used as part of the purchase money of the property. On the same day, both deed and mortgage were recorded. It did not appear that there was any intention on the part of the vendor or of the mortgagee that the vendor's lien for purchase money should be kept alive by the mortgage.

Franklin Swayne, for the appellant.

Sheldon Potter and William H. Staake, for the appellee.

³²⁷ GREEN, J. We agree entirely with the learned court below in holding that the mortgage of the plaintiff in this case was a purchase money mortgage, under the evidence, and was entitled to priority in the distribution. The delivery of the deed to the mortgagor and of the mortgage to the mortgagee were concurrent and simultaneous acts, and the money for which the

mortgage was given was in actual fact a part of the purchase money paid for the property, at the very time of the delivery of the deed. In both the cases, *Cohen's Appeal*, 10 Week. Not. Cas. 544, and *Albright v. Lafayette etc. Assn.*, 102 Pa. St. 411, this court held that it was not necessary that the lien should disclose on its face that it is for purchase money, if, in point of fact, whether it be a mortgage or judgment, it was given for purchase money. We agree with the auditor in holding that the positive prohibition contained in the tenth clause of the building contract against the filing of any liens by any subcontractors, or any other persons, excluded the claimants who were subcontractors from filing any liens, notwithstanding the provisions contained in the third clause. The learned court below, having held otherwise, and reversed the auditor on this subject, subsequently, in the second opinion filed, changed its ruling on account of the decision of this court in *Morris v. Ross*, 184 Pa. St. 241, and sustained the action of the auditor in rejecting the claims of the subcontractors. The decision of the court in the first opinion was based upon the theory that the provisions of the third section of the contract contemplated the filing of liens and their release before payments could be required, and hence sanctioned the filing of liens, and as there was an absolute repugnance between the third section and the tenth in this respect, it could not be held that the right to file liens under the third section could be intended to be taken away by the tenth. But in the case last cited we had the precise question before us, and we decided that the positive provision prohibiting all liens must prevail, and that the provision authorizing the owner to require of the contractor sufficient evidence that the premises were free of all liens before payments could be demanded, and to retain an amount sufficient to indemnify him against such liens, ³²⁸ was not repugnant to the prohibitory clause, but only a protection against possible liens which might be filed without regard to the contract. In the present case, the tenth clause of the contract is in the following words: "It is hereby further agreed that there shall be no liens entered or filed by any subcontractors, or any other persons, for or on account of any work, labor, or materials done or supplied in or upon said building." That these words are a prohibition against any liens is established by all our decisions from *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, to this time. The learned court below held that they excluded subcontractors, but, for reasons set forth in the opinion, they did not exclude

the principal contractor. We are not able to agree to this conclusion. It seems clear to us that the words "or any other persons" include all other persons, and necessarily include the principal contractor, as the words are generic and necessarily include all persons who have a right to file liens. Moreover, we think it quite plain that the words of the third section are consistent with the theory of a mere protection against possible liens, and are, therefore, not repugnant to the positive prohibition contained in the tenth clause. All this we held in *Morris v. Ross*, 184 Pa. St. 241. But, if this is so, the principal contractor has no more right to file a lien than any subcontractor. The tenth section is in words that are written, as contradistinguished from the other words of the contract which are printed words in a printed blank, and the tenth section is the last utterance of the contract on this subject, and, if there were repugnance between the third and tenth sections, the tenth would prevail. In *Grandin v. Rochester etc. Ins. Co.*, 107 Pa. St. 26, in construing a policy of insurance we said: "This clause of the policy is in writing, and must be taken to be what the parties intended. The condition is the printed portion. The settled rule of law is that where the written and printed portions are repugnant to each other, the printed form must yield to the deliberate written expression." We are therefore of opinion that the learned court below was in error in awarding any part of the fund to the lien of the contractor.

The decree of the court below is reversed at the cost of the appellee, and the record is remitted with instructions to distribute the fund in accordance with this opinion.

MORTGAGE—PURCHASE MONEY.—Where the vendor executes and delivers a deed, and immediately receives back a mortgage as security for the price, the acts are contemporaneous and parts of the same transaction, and afford no opportunity for the liens of creditors of the grantee to attach to the legal estate before that of the grantor for the unpaid purchase price: *Rees v. Ludington*, 13 Wis. 276, 80 Am. Dec. 741. See, too, *Türk v. Funk*, 68 Mo. 18, 30 Am. Rep. 771; *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322. A deed and mortgage are presumed to be but one transaction when they bear the same date, and are between the same parties: *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354.

CONTRACTS—REPUGNANT CLAUSES.—Contracts partly written and partly printed are controlled by the written part in case the parts are apparently inconsistent: *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, and note; *Gilbert v. Stockman*, 76 Wis. 62, 20 Am. St. Rep. 23.

MECHANICS' LIENS—COVENANTS AGAINST.—Stipulations in the contract between the builder and owner against making a building liable to liens of others, are discussed in *Benedict v. Hood*, 134 Pa. St. 289, 19 Am. St. Rep. 698, and note.

HUMPHREYS v. SUTCLIFFE.

[192 PENNSYLVANIA STATE, 336.]

ABUSE OF PROCESS—MALICE.—WHEN PROCESS ISSUED IS LEGAL, the plaintiff is answerable only for a malicious abuse of it; and where the circumstances afford no inference of malice, actual malice must be proved.

ABUSE OF PROCESS—DEFENSE—DOMESTIC ATTACHMENT.—In an action for maliciously suing out a writ of domestic attachment, it is a sufficient defense to show that the suspiciousness of the plaintiff's conduct had made recourse to an attachment a measure of reasonable precaution.

ABUSE OF PROCESS—ATTACHMENT FOR DEBT NOT DUE.—Although a debt is not yet due, a writ of attachment may issue if other circumstances are such as to justify it; such issuance is not illegal, and there can be no recovery without express proof of malice.

ABUSE OF PROCESS—FOREIGN ATTACHMENT—MALICE.—A writ of foreign attachment is not illegal simply because it was prematurely issued; hence, where such an attachment is issued on the day a note matures and is dishonored, and it is an open judicial question whether such issuance is strictly legal, the weight of authority being in favor of its legality, and all other facts sufficient to authorize its issue were present, and there is no evidence of actual malice, an action for abuse of civil process in issuing the attachment cannot be sustained.

Leoni Melick and Sheldon Potter, for the appellant.

David W. Sellers and H. C. Terry, for the appellees.

338 GREEN, J. This action was brought to recover damages for the malicious use of legal process without probable cause. The process issued by the defendants against the plaintiff was a writ of foreign attachment under which certain woolen yarn in large quantity, the property of the plaintiff, was seized and injured while in custody under the writ. The process was issued by the defendants against the plaintiff on Saturday, August 4, 1894. On that day a promissory note given by Humphreys to Sutcliffe & Co. for twelve hundred and ninety-seven and seventy-eight hundredths pounds sterling, payable at the National Provincial Bank of England, London, fell due, and was not paid but protested. The time at which the writ of foreign attachment was issued was after the close of bank hours in London, though during bank hours in this country. Six days later, on August 10, 1894, the defendant applied to the court out of which the writ issued, to wit, the circuit court of Camden, New Jersey, for an order to show cause why the writ of attachment should not be dissolved, and this rule was subsequently made absolute. On appeal, the action of the circuit

court was affirmed by the supreme court, and afterward, on September 13, 1895, by the court of appeals. It was claimed by the plaintiff in the present action that the stock of woolen yarns seized under the attachment was destroyed by moths during this interval, and for the damages thus sustained the present action was brought.

339 On the trial, the plaintiff was nonsuited because there was no evidence of malice or want of probable cause in the issuance of the writ of attachment. It is contended for the plaintiff that he is entitled to recover damages without proof of malice or want of probable cause, and also that under the evidence the jury would have been justified in finding both malice and want of probable cause. The first contention raises the question whether the writ was properly issued on the same day when the note fell due and was protested. On this question the authorities are conflicting, most of them holding that, in the case of notes payable at bank, an action can be brought on the day of maturity after protest, and others holding that the whole of the day of maturity must be allowed before suit can be brought. The court of appeals of New Jersey held that the writ was prematurely issued in this case on the day of maturity of the note, and that it was therefore proper to dissolve the attachment. This decision, however, was not based upon any prior decision of the New Jersey courts, but upon a ruling to that effect by the court of appeals of New York, and a decision of this court in *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615. The latter case was a judgment by confession under a warrant of attorney annexed to a note payable one day after date, and was likened in the opinion to the case of a bond where, as a matter of course, the obligor has the whole of the last day in which to make payment and is not in default until the day has ended. But the present case was that of a note payable at a bank, and it was dishonored and subject to protest when it was not paid, at the close of banking hours on the last day of grace. In that class of cases, the preponderance of the authorities is that suit may be brought after demand and refusal on the last day of the maturity of the note. In 2 *Parsons on Bills and Notes*, 461, the rule is thus stated: "On this point the rule may not be positively determined by authority, but there is strong reason for holding that a party bound to pay has the whole of the day of maturity; and that without demand and refusal an action cannot be maintained unless it is brought after sunset, or, perhaps, after business hours on that day. We are,

however, of opinion that, after demand and refusal on that day, an action may at once be maintained; for he has declared that he will not pay and can want further delay only to arrange the means of avoiding payment. But ³⁴⁰ without such prior demand and refusal an action commenced on the day of maturity is premature, unless the note is payable at a bank, when it seems that suit may be commenced after bank or business hours." In the very copious note (e) to the foregoing text the author has collected a large number of decisions, both in England and the United States, in which the rule stated in the text was adopted. In one of the most prominent of them, *Greeley v. Thurston*, 4 Greenl. 479, 16 Am. Dec. 285, the court said: "Upon consideration, we adopt the views of Mr. Justice Buller; and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour on the day they fall due; and, if not then paid, that the acceptor or maker may be sued on that day, and the indorser or drawer also, after notice given or duly forwarded." The question did not arise in *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615, because that was not an action founded upon a note payable at bank, and there was no demand and refusal to pay, but the judgment was entered up and execution issued on the day of the maturity of the obligation. Other textwriters express the same views as above cited from *Parsons on Bills and Notes*, and the courts of last resort in many states have ruled in the same way. But it is not necessary to pursue the discussion of this subject nor to make any decision of the question, as it is not essential to the determination of this case. It is only important to refer to the matter in another connection, and that is, as it affects the question of malice or the malicious use of legal process. It certainly cannot be said that when a creditor issues a process of foreign attachment in the circumstances which are appropriate to the issue of that writ, he has been guilty of issuing illegal process, or of doing so with malice or with a malicious purpose, resulting simply from the issue of the process. In this case, the note was payable at a bank on a given day, payment of the note was demanded and was refused, the debt due the payees of the note was put in jeopardy, and, as vigilant creditors looking to the security of their claim, they had a perfect legal and moral right to take the speediest measures that were possible to secure the payment of their debt. At the very best that can be said for the contention of the present plaintiff, it was a gravely doubtful question whether his

creditors might not issue their writ at the time they did. There was no decided case in New Jersey ruling that question; it was ³⁴¹ eminently a commercial question in the law relating to negotiable securities, with the great preponderance of the adjudged cases in favor of the issue of the writ at the time it was done, and it was issued in circumstances from which there was no occasion for the debtor to suffer any damage or loss whatever. He admits that the writ could properly issue in one day more, and he asserts that he would have paid the debt on Monday following, the second day after the writ was issued, if it had been insisted upon. Conceding that the writ was issued too soon, therefore, if the debtor suffered any injury from the attachment of his property it was of his own choosing, and because of his continued dereliction in not paying his lawful debt, which he does not pretend to dispute, and for the payment of which he continued liable whether the writ was issued too soon or not. The attachment would have been dissolved at once upon his performing his plain legal duty of paying his debt two days after the writ issued. It is quite apparent, therefore, that there is no meritorious ground of recovery in this action by reason of any oppressive action of the defendants. It remains only to see whether it has such technical merit as will require a reversal of the judgment of the court below.

The nonsuit was granted upon the ground that there was no proof of malice in the case and no want of probable cause shown. In the leading case of *McCullough v. Grishobber*, 4 Watts & S. 201, it was held that a domestic attachment may issue upon a debt which is not due and payable, if there be in other particulars a sufficient ground for it. When process issued is legal, the plaintiff is answerable only for a malicious abuse of it; and where the circumstances afford no inference of malice, actual malice must be proved. In an action for maliciously suing out a writ of domestic attachment, it is enough for the defense that the suspiciousness of the plaintiff's conduct had made recourse to an attachment a measure of reasonable precaution, irrespective of the fraudulent intention of the debtor.

Such is the syllabus of the foregoing case, and yet it is cited for the appellant as authority to support his contentions. It was decided that, although the debt was not due when the writ of attachment was issued, if the other circumstances were such as to justify the issuing of the writ, it was not illegal under the act, and there could be no recovery without express proof of ³⁴² malice. It was also held that the circumstances afforded no

inference of malice. The court said: "If, then, the defendants were competent to sue out the attachment, or, in other words, if the writ was not originally illegal, little more remains to be decided, for it is conclusively settled that where the process is legal, the plaintiff is answerable only for a malicious abuse of it; and that where the circumstances afford no inference of malice, as in *Gibson v. Chaters*, 2 Bos. & P. 128, actual malice must be proved. Of actual malice in this case there is not a shadow; and what are the circumstances?" The court then reviews the circumstances and shows that the conduct of the debtor was such as to give rise to a suspicion that he intended to do the things which subjected his property to seizure under the domestic attachment law. It was held that, under the law, although the debt was not due when the attachment was issued, the other requirements of the statute were present, and although the jury had found as a matter of fact that the debtor had not done the things that subjected him or his property to the process of domestic attachment, still, because there was ground to apprehend that he had done those things, and no proof of malice, he could not recover. It does not necessarily follow that because a process is prematurely issued it is necessarily illegal, if the right to issue it was apparently existing. So here it was perfectly true that there was a highly probable and apparent right to issue the writ at the time it was issued—the manifest preponderance of judicial decision and textwriters' opinions declared and supported the right; there was no opposing decision of the New Jersey courts; and all the circumstances were present which authorized the issue of the writ. How can it be said that the issue of the writ was so palpably wrong and contrary to law as to make it absolutely illegal? It was not illegal in itself in the slightest degree; it was the precise and appropriate writ to issue in just such circumstances. In *Mayer v. Walter*, 64 Pa. St. 283, the distinction upon this subject is carefully pointed out in the opinion delivered by Mr. Justice Sharswood, as follows: "There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it. . . . On the other hand, legal ³⁴³ process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. As every man has a legal power to prosecute his claims in a court

of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class of cases to aver and prove that he has acted not only maliciously but without reasonable or probable cause." In *Eberly v. Rupp*, 90 Pa. St. 259, an action to recover damages for the unlawful issue of a writ of estrepement, there was a recovery in the court below, but we reversed the judgment without a venire. Mr. Justice Gordon, delivering the opinion, said: "It is true injury may result from the use of the writ of estrepement, but so may it result from the writ of ejectment. In the one case the defendant may be hindered in the exercise of his business, in the other he may from the cloud thrown upon his title be prevented from making an advantageous sale of his property. . . . In fact, the plaintiff has little of which to complain, for she might, on application to the court, have had the writ dissolved; neglecting to do so, if injury resulted, she has herself to blame. . . . And although legal process may, by its malicious use, give rise to a cause of action, yet, even in such a case, there must not only be a malicious use, but there must be no reasonable or probable cause for such process, since, if there be such cause, the intention goes for nothing."

These citations dispose of all the serious contentions in the present case. We are of opinion that the writ of attachment was not necessarily illegal, simply and only because it was prematurely issued; that as an open question it was apparently strictly legal; it was the proper and precise writ to issue in the circumstances of the case, as all the facts which were sufficient to authorize its issue were present; and, lastly, there was not only no proof of malice or malicious use of the process in the case, but the actual facts and circumstances that were plainly present entirely dispelled any inference of malice. We find no error in the several assignments and they are all dismissed.

Judgment affirmed.

ATTACHMENT — DEBT NOT DUE.—Writ of garnishment, strictly speaking, is not an action for the recovery of a debt, but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time. An attachment of insurance money before proof of loss is not premature: *Phenix Ins. Co. v. Willis*, 70 Tex. 12, 8 Am. St. Rep. 566. In general, a debt not due is not subject to attachment: *Davis v. Clafin Co.*, 63 Ark. 157, 58 Am. St. Rep. 102, and note; *Sharman v. Huot*, 20 Mont. 555, 63 Am. St. Rep. 645, and note.

PROCESS.—ABUSE OF PROCESS is the malicious perversion of a regularly issued process to accomplish some purpose whereby a

result not lawfully nor properly attainable under it is secured. An action will lie for such abuse: *Nix v. Goodhill*, 95 Iowa, 282, 58 Am. St. Rep. 434, and note; *Antcliff v. June*, 81 Mich. 477, 21 Am. St. Rep. 533. Liability may arise on a foreign, as well as on a domestic, attachment. Malice is indispensable to an action for wrongful attachment, and the burden of proof of malice is on the plaintiff seeking to establish it: Note to *Burton v. Knapp*, 81 Am. Dec. 477. For instances of abuse of process by wrongful attachment, see *Doctor v. Riedel*, 96 Wis. 158, 65 Am. St. Rep. 40; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; note to *Burton v. Knapp*, 81 Am. Dec. 467-480.

NEFF v. HARRISBURG TRACTION COMPANY.

[192 PENNSYLVANIA STATE, 501.]

RAILROADS.—IT IS CONTRIBUTORY NEGLIGENCE FOR A PASSENGER to leave a car while it is in motion.

RAILROADS—NEGLIGENCE IN ALIGHTING FROM CAR—INSTRUCTIONS.—In an action for personal injuries, where the evidence is absolutely contradictory as to whether the plaintiff alighted from a street-car while it was in motion, it is reversible error for the court to instruct the jury that, if they took the version given by the defendants, they might find the plaintiff guilty of contributory negligence and deny a recovery; the instruction should have been absolute and peremptory instead of qualified and conditional.

RAILROADS — NEGLIGENCE IN ALIGHTING FROM CAR—INSTRUCTIONS.—Where there is no evidence to show that a car was going so slowly as to be substantially stopped when an accident occurred, it is reversible error to introduce such an element into an instruction to the jury.

Trespass for personal injuries. The assignments of error related to four instructions by the court: 1. If the plaintiff was thrown off the car because she undertook to get off before the car had come to a stop, then the jury might ascertain that she ought to have waited and that the defendant had done nothing out of the way; 2. The second instruction is given in the opinion; 3. If the car had stopped before the plaintiff began to get off, or was so near stopped that it was practically stopped, then she would have a right to get off, and if an accident then occurred she could recover; 4. The fourth instruction introduced the same element of the car going so slowly as to be substantially stopped. Judgment for the plaintiff.

C. L. Bailey, of Wolfe & Bailey, for the appellant.

S. S. Rupp, for the appellee.

⁵⁰⁴ GREEN, J. On the trial of this case two witnesses examined for the defendant testified positively that Mable Neff

and her sister left the car while it was in motion and before it stopped. She and her sister testified that they did not leave the car until it stopped, and that it started with a sudden jerk while they were getting off, and that this was the cause of Mable Neff's fall. The witness, Lillian Adams, testified that the Neff girls got off while ⁵⁰⁵ the car was moving, and that she herself did not get off till after the car stopped, and she then saw Mable Neff lying on the street where she had fallen. Kohler testified to the same effect. He said: "I pulled the door open, and I noticed one lady got off the car before it stopped and I seen her take a pitch. . . . Q. It was the first one you say you saw take that pitch? A. The first lady got off before the car stopped; I seen her take the pitch toward the corner of the house or curb as they call it."

As these witnesses were entirely disinterested, there was no reason to disbelieve their testimony. It was not possible to reconcile their testimony with that of the plaintiff and her sister, because both of them swore positively that the car had stopped before they got off. It was therefore a matter of prime importance to determine how this disputed fact was, and that determination involved the question of the credibility of the witnesses. The plaintiff was, of course, directly interested, and her sister naturally sympathized with her. Miss Adams and Mr. Kohler were disinterested spectators. If their testimony was believed the plaintiff certainly could not recover. All our decisions are to that effect. In *New York etc. R. R. Co. v. Enches*, 127 Pa. St. 316, 14 Am. St. Rep. 848, we said: "We have so often held that it is contributory negligence for a passenger to leave a car while it is in motion that it is unnecessary to discuss that question." In *Victor v. Pennsylvania R. R. Co.*, 164 Pa. St. 195, we said: "It may be stated as a general proposition that it is negligence on the part of a passenger to alight from a moving train."

It is plain, therefore, that if the jury in this case believed the testimony of the defendant's witnesses, it was their plain duty to return their verdict in favor of the defendant. Now, the learned trial judge, in commenting upon this part of the case, said to the jury: "And if you take the version given by the defendants, that the car had not yet come to a stop when the plaintiff undertook to get out, then you might find her guilty of contributory negligence, and in that case she would not be entitled to recover." It is altogether probable from the context that the court did not intend, by the use of the word "might"

in this connection, to put, or to intimate, a qualification upon the defendant's right to a verdict in case the jury should find that the plaintiff left the car while it was in motion. But the literal meaning of the words used in the charge is only that the jury ⁵⁰⁰ might find for the defendant in the event stated, and not that they should or must so find in that event. If, however, the jury only might find for the defendant in that contingency, there is a necessary implication that they nevertheless might find for the plaintiff, notwithstanding the plaintiff left the car while it was in motion; in other words, they would be under no obligation to find for the defendant in case they found that the plaintiff left the car while it was in motion. As there was no proof of any circumstances which constitute an exception to the operation of the rule, it follows that the instruction should have been in the absolute and peremptory form, and not in the qualified and conditional form in which it was presented. The jury would be at liberty to understand from the words of the charge on this subject that the plaintiff's act of leaving the car while it was in motion would be no bar to her recovery in this action.

The portion of the charge covered by the first assignment is amenable to the same criticism, because if the plaintiff did get off the car before it stopped, it was the bounden duty of the jury to decide that she ought to have waited, and it would not be correct to say that they might ascertain that she ought to have waited. The use of the word "might" in this connection in these two portions of the charge would have a tendency to mislead the jury as to their proper function in the contingencies mentioned, and while we think it was entirely unintentional on the part of the learned judge, and that he did not design to convey a doubtful meaning, yet, as the jury might have been misled, we feel bound to sustain these two assignments of error.

As there was no evidence to show that the car was going so slowly as to be substantially stopped when the accident occurred, we think it was a mistake to introduce that element into the answer to the defendant's point, and we therefore sustain the fourth assignment. We think the point should have been affirmed without qualification, just as it stood. The matter of the third assignment is covered by the same ruling. It is true the matter was introduced into the plaintiff's point, but as there was no evidence to which it could apply, the court should have so said in their answer, instead of affirming the point as it was presented.

Judgment reversed and new venire awarded.

RAILROADS.—WHETHER ALIGHTING FROM A MOVING TRAIN is contributory negligence on the part of a passenger is ordinarily a question for the jury; *Note to New York etc. R. R. Co. v. Enches*, 14 Am. St. Rep. 851. Compare notes to *Central R. R. etc. Co. v. Letcher*, 44 Am. Rep. 808; *Jewell v. Chicago etc. Ry. Co.*, 41 Am. Rep. 65.

CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS REGARDING.—It is error to refuse to charge that if the plaintiff's own negligence caused or contributed to the injury, he cannot recover, when there is evidence to support such charge: *Brown v. Gilchrist*, 80 Mich. 56, 20 Am. St. Rep. 496. The court may properly refuse to instruct the jury that if they believe certain facts to be true, of which evidence has been given, the defendant is guilty of negligence as a matter of law, and the plaintiff entitled to recover: *McCully v. Clarke*, 40 Pa. St. 399, 80 Am. Dec. 584.

LEHR v. BRODBECK.

[192 PENNSYLVANIA STATE, 585.]

SALE—CHANGE OF POSSESSION—FRAUDULENT.—

Where a brother and sister live on a farm, and the brother gives a bill of sale of all the personal property to his sister, there being no break in the possession, real or ostensible, such sale is fraudulent as to the brother's creditors, although there was no intent to defraud.

NEW TRIAL—ABUSE OF DISCRETION IN REFUSING.

Where a court instructs a jury to find for the plaintiff in a certain amount, and the jury, in disregard of such instruction, brings in a general verdict for the defendant, the plaintiff has a right to have the verdict set aside and to have a new trial granted, and it is an abuse of discretion for the court to direct the plaintiff to accept a sum less than the amount to which she is entitled in full settlement of her claims, or if she refuses to take nothing.

N. M. Wanner and E. D. Bentzel, for the appellant.

James G. Glessner, for the appellee.

⁵³⁷ **DEAN, J.** This is an action of trespass against defendant, sheriff of York county, to recover damages for the alleged wrongful ⁵³⁸ seizure and sale of her goods on an execution against her brother, Charles A. Lehr.

The farm on which the property, livestock, farming implements, grain in the ground, etc., was seized belonged to the brother. Both were single. The evidence showed that they went upon the farm in 1886, she keeping house for him until the date of the sale. At the time they went upon the premises, by a written agreement, the brother leased to her the house, yard, and garden, she to furnish board and lodging for

all the help he might require upon the farm; further, that she should keep upon the farm, cows, hogs, chickens, and turkeys; further, she should receive from him the sum of twelve dollars per month. It was further stipulated that, at any time her compensation amounted to a sufficient sum, she should have the right to purchase all the personal property on the premises and hold the same as her own.

From the date of this agreement, for about ten years, the brother and sister lived upon the farm under the terms of it. In October, 1896, she claimed there was due her from him under it fourteen hundred and forty dollars; and, further, that in October, 1891, she had loaned to him of her own money nine hundred and eighty-six dollars, and had taken his receipt therefor, both sums with interest making three thousand three hundred and eighty-eight dollars and fifty cents; and that in payment of this debt he had sold and delivered to her, by bill of sale in writing, all the personal property upon the farm not already owned by her, including grain in the ground and tobacco. The plaintiff claimed, as belonging to her under the terms of the first agreement, made when they went into possession, and as purchased from others by herself, certain livestock and poultry of the value of three hundred and thirty-five dollars.

To April term, 1895, one George Rutter obtained a judgment against Charles A. Lehr, on which, to January term, 1897, he issued execution, levied on all the property on the farm; the sheriff sold the same at public sale; before sale he was notified by the sister that the property belonged to her. She then brought this action. At the trial in the court below three questions arose on the evidence: 1. Was the sale by the brother to her actually fraudulent? 2. If not fraudulent in fact, was it against creditors constructively fraudulent, for want of such change of possession as required by law in a sale of chattels? 539 3. What articles were the sister's, not purchased from the brother under the bill of sale, and what was their value?

As to the goods purchased from her brother under the bill of sale, the court instructed the jury thus: "So, in this case, there was no visible change of possession, either actual, by notice, sign, symbol, or otherwise; and the property continued in the possession of Charles A. Lehr, on the property where he alleged the sale took place. And, as a matter of law, we instruct you that the plaintiff cannot recover for any articles which she alleged she purchased from Charles A. Lehr, her brother, and which remained in his possession, excepting the growing grain

and manure. The post and rails, and the farming implements and the horses, and all the other articles, were not sufficiently, in the opinion of the court, delivered to the plaintiff, and she did not exercise exclusive control over the same, in the opinion of the court, to justify the matter being submitted to the jury, and to vest the property in her. Therefore, we instruct the jury that you cannot allow for any articles which she alleged she purchased from her brother, excepting the grain in the ground, the manure, and the cooking stove, which I understood was in the house, and we will take it for granted that it was in the house, because it does not appear that it was otherwise, so far as I remember, and it is alleged to have been sold for one dollar."

This is made the subject of complaint in appellant's first, second, third, fourth, and fifth assignments of error. From the evidence, it is probable there was no intentional fraud in this sale. The decided weight of the evidence seems to show that the brother, during the ten years they had been living together on the farm, had become indebted to the sister to the amount of the purchase money; he appears to have been thriftless, perhaps to some extent unfortunate; she was industrious and frugal, carefully turned the products of the farm coming to her into money, and saved it. The purpose of the sale seems not to have been to hinder, delay, or to defraud the brother's creditors, but to prefer her as a creditor. But there was no change of possession, such as the property was capable of, following the sale, either actual or symbolical. True, the brother was not required to separate from his sister and leave the farm, so that she could remain in the exclusive possession of the property; ⁵⁴⁰ but he could have withdrawn from the control of it; could have surrendered the keys of the barn to her; both or either could have, in some public manner, manifested the change of ownership which had taken place. But to all outward appearances his ownership remained the same as before; there was no break in the possession, real or ostensible. As to creditors, therefore, the sale was constructively fraudulent, under all the authorities from *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 346, down to *Pressel v. Bice*, 142 Pa. St. 270. But as to the property which she took upon the farm ten years before, and purchased from others afterward, that was clearly hers; the brother never had title to or possession of it; his creditors had no more claim to it, either in law or equity, than to the shoes upon her feet. The jury, as to this property, should have been

peremptorily instructed to find in her favor its value on the evidence; and that was the opinion of the learned judge of the court below, as is apparent from his charge. But evidently, much to his surprise, they brought in a general verdict for defendant. It is not improbable they failed to comprehend his instructions. Instead, however, of at once setting aside the verdict and ordering a new trial, he entertained a motion for a new trial; while this was pending, the court received a communication for defendant's counsel, stating that his client would pay two hundred and fifty dollars and the costs; thereupon it directed that, on proof of tender of that amount to plaintiff and costs in full settlement of her claim, and her refusal to accept it, the new trial would be refused. On tender, she did refuse it; thereupon, the court overruled the motion for a new trial, and directed judgment for defendant with costs of suit. This action of the court forms the basis of appellant's seventh and eighth assignments of error. The exercise of discretion by the court in granting or refusing a new trial is never reviewed here, except in a clear case of abuse of that discretion. And the action of the court in directing the release or modification of a verdict in favor of the plaintiff, with the alternative of a new trial if the direction be not heeded, has more than once been held a proper exercise of discretion. But here, in flat disobedience to the instruction of the court, the verdict was for defendant. The plaintiff claimed that the value of her goods, wrongfully seized and sold, even under the law as held by the court was three hundred and thirty-five dollars. And whether this was the ⁵⁴¹ value or not, she had offered evidence tending to establish it as the value. As a suitor, under the law, she had a right to the opinion of the jury on the evidence; and the court at the trial thought so too. It, however, now directs her arbitrarily to strike from her claim eighty-five dollars, and, as a penalty for refusal, in effect, says she shall have nothing and pay the costs. Under all the rules regulating the practice of courts, she was entitled to a new trial when the jury, either ignorantly or contumaciously, refused to obey the law as directed by the court; but where is the authority in precedent or reason for arbitrarily deducting from what she insists is an honest claim, eighty-five dollars? The court does not say take two hundred and fifty dollars or a new trial, for she has no verdict; but it says, take two hundred and fifty dollars or nothing, and pay the costs, in the face of its own opinion at the trial that she was in law entitled to the value of her goods

wrongfully seized for her brother's debt. We think there was no discretion in the court authorizing it to impose such terms.

There was another stipulation in the terms imposed which is, to say the least, of doubtful propriety. She was to accept the two hundred and fifty dollars in "full settlement of her claims." Her claims were over three thousand dollars, including the property embraced in the bill of sale by her brother; if she assented to the terms of the order, her right to have reviewed here the law as announced by the court with reference to constructive fraud was relinquished; the defendant would have been discharged, not only from the claim for three hundred and thirty-five dollars, but from that of three thousand dollars. We think the terms in this particular were hard ones, and not such as should meet the approval of this court. Penalties should not be imposed upon suitors which shut them off from the appeals allowed them by law. If the court had directed defendant to pay and plaintiff to accept three hundred and thirty-five dollars, the amount of her claim, leaving her free to prosecute her assignment of error to the law laid down on the question of constructive fraud, she could then have had no ground of complaint, for no right would have been invaded.

Nor are we without authority on the point. In *Bradwell v. Pittsburg etc. Ry. Co.*, 139 Pa. St. 404, the plaintiff brought suit for damages against the railway company for injuries caused by neglect to keep its track in repair. A broken and bent rail had caused a serious injury to himself and vehicle. There was no question as to the negligence of defendant. It was in dispute whether ⁵⁴² plaintiff had contributed to the injury by negligent driving. This was left to the jury, who found a verdict for plaintiff in six and one-fourth cents damages. On a motion for a new trial, the trial judge held that either the plaintiff on the evidence was entitled to substantial damages or to nothing, but, to avoid the trouble and expense of a new trial, he undertook to administer what seemed to him the equities of the case, and made this order: "That if defendant pay to plaintiff within thirty days four hundred dollars with costs, then new trial is refused, otherwise new trial will be granted." The plaintiff refused to accept the four hundred dollars, and the court entered judgment on the verdict. On review by this court, in an opinion by the present chief justice, it was held that plaintiff had a right to have the jury pass on the question of damages, and by their verdict award him such sum as he was entitled to. And for this reason, among others, the judgment was reversed.

There is nothing of merit in the sixth assignment of error calling for discussion, and it is overruled. But for the reasons already given, the seventh and eighth assignments are sustained.

The judgment is reversed and a venire facias de novo awarded.

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION. An absolute bill of sale is void as to creditors of the vendor, unless followed and accompanied by possession in the purchaser: *Hundley v. Webb*, 3 J. J. Marsh. 644, 20 Am. Dec. 189. Retention of personal property after a sale thereof is fraud per se as against creditors of the vendor: *Born v. Shaw*, 29 Pa. St. 288, 72 Am. Dec. 633; *Jarvis v. Davis*, 14 B. Mon. 529, 61 Am. Dec. 166.

NEW TRIAL.—DISREGARDING PROPER INSTRUCTIONS by the jury is ground for setting aside the verdict: *Limburg v. German Fire Ins. Co.*, 90 Iowa, 709, 48 Am. St. Rep. 468. In an action on a note the jury were instructed that the note was usurious, hence the verdict should be for the defendant. The jury found for the plaintiff, and the court granted a new trial. On a second trial, against the opinion of the court, a verdict was again given for the plaintiff, and the court set aside the latter verdict and granted a new trial: *Wilkie v. Roosevelt*, 3 Johns. Cas. 206, 2 Am. Dec. 149. For an extended discussion of new trials and instructions to juries, see the monographic notes to *Strohn v. Detroit etc. R. R.*, 99 Am. Dec. 118-138; *State v. Whit*, 72 Am. Dec. 538-549.

REIMER v. REIMER.

[192 PENNSYLVANIA STATE, 571.]

WILLS—DEVISE—RULE IN SHELLEY'S CASE.—In a devise of land to a daughter "for her sole use and benefit during her natural life and for her heirs, if dying she leaves no heirs, then the said property to be sold and divided amongst her brothers and sisters and their heirs," the word "heirs" is a word of limitation, and the devise creates a fee simple in the daughter. The same is true of a devise to a daughter for her use and benefit during her life, and provided she leaves no heirs, the property to be divided amongst her brothers and sisters and their heirs.

Case stated to determine the marketable title to real estate.

M. N. McGeary and J. R. Spiegel, for the appellant.

H. H. Dinsmore, for the appellees.

572 McCOLLUM, J. The question presented by the case stated is whether the plaintiffs have a title in fee simple to the land described in the article of agreement, or only a life estate therein. If they have a title in fee simple the judgment entered by the court below must be sustained, and if they have but a life estate it must be reversed. The parts of the will which relate

to the contention in this case are as follows: "Item, I give and bequeath to my daughter, Sarah Reimer, the double frame house and lots on the northwestern corner of Carver and Park Ave. Also one third of the grounds on Frankstown Avenue between Isabell's lots and the improved lots belonging to my wife, Mary A. Said lots being for her use and profit during her natural life and provided she leaves no heirs in that case said property to be sold and the proceeds divided amongst her brothers and sisters and their heirs. Item, I give and bequeath to my daughter Caroline Reimer, the double frame house and lot on Park Ave. adjoining lot of Sarah Reimer between Carver and Meadow streets. Also one third of grounds on Frankstown Ave. between Isabell's house and the improved lots belonging to my ⁵⁷³ wife, Mary A. Reimer. Also one lot on the northerly side of Carver street, 23 x 100 feet next lands of Andrew Reimer between Park and Ashley street, the said lots being for her sole use and benefit during her natural life and for her heirs, if dying she leaves no heirs, then the said property to be sold and divided amongst her brothers and sisters and their heirs."

The estates devised to the plaintiffs respectively are of the same nature. There is no room in the devises for a construction which passes to one plaintiff a title in fee simple, and to the other a life estate. This much is conceded by the defendant. But it is contended in her behalf that the word "heirs" in each devise is a word of purchase and means "children." The principal case relied on by the defendant to sustain this contention is Findlay v. Riddle, 3 Binn. 139, 5 Am. Dec. 355. But an examination of the will in the case cited shows that its provisions differ materially from the provisions of the will under consideration in the case at bar. Matters which influenced the construction of the will in the former case are not present, and cannot control the interpretation of the will in the case before us. The other cases cited by the defendant are Cote v. Von Bonnhorst, 41 Pa. St. 243; Gernet v. Lynn, 31 Pa. St. 94; Guthrie's Appeal, 37 Pa. St. 9; Chew's Appeal, 37 Pa. St. 23; List v. Rodney, 83 Pa. St. 483; Keim's Appeal, 125 Pa. St. 480. In these cases the testator or testatrix devised or bequeathed to a son or daughter or nephew a life estate with remainder in fee to their children. The word "children" being a word of purchase, and there being nothing discoverable in the wills which authorized a conclusion that it was intended or used as a word of limitation, the first takers were held to

have a life estate only. It is very clear that these cases are not decisive of or applicable to the case at bar. The word "heirs" in the parts of the will under consideration in the latter is a word of limitation, and there is no warrant in the will for an interpretation of it in accordance with the defendant's contention.

Our conclusion from an examination of the cases which seem to us as applicable to the case in hand is that the plaintiffs have a fee simple title to the land in question. The cases to which we call particular attention are Doeblor's Appeal, 64 Pa. St. 9, Kleppner v. Laverty, 70 Pa. St. 70, and Grimes v. Shirk, 169 Pa. St. 74. In ⁵⁷⁴ the latter case Judge Livingston, in an exhaustive opinion, reviewed the cases pertinent to the subject considered in this case and to them, in addition to the cases cited, we refer.

Judgment affirmed.

WILLS—RULE IN SHELLEY'S CASE.—A devise to one "during her natural life, and after her death to the begotten heirs or heiresses of her body forever," vests in the devisee a fee simple according to the rule in Shelley's case: *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. Rep. 30. For further applications of the rule to devises, see *Hughes v. Niklas*, 70 Md. 484, 14 Am. St. Rep. 377; notes to *Polk v. Faris*, 30 Am. Dec. 415-417; *Carpenter v. Van Olinder*, 11 Am. St. Rep. 99-107.

PHILADELPHIA BALL CLUB v. PHILADELPHIA.

[192 PENNSYLVANIA STATE, 632.]

EMINENT DOMAIN—CHANGE IN GRADE OF STREET—DAMAGES FOR.—Where property has been injured by a change in the grade of a street, or other act, the damages which the owner is entitled to recover are the difference between the value of the property immediately before and immediately after the injury is inflicted.

EMINENT DOMAIN—DAMAGES—FUTURE PROFITS. Where property is taken or injured under the power of eminent domain, consequential or speculative damages cannot be allowed, and future profits of the plaintiff's business are not to be considered for any purpose whatever.

EMINENT DOMAIN—DAMAGES—FUTURE EXPENSES. In estimating damage caused to property under the power of eminent domain, no consideration can be given to circumstances occurring after the completion of the injury: hence, in a proceeding to recover damages to a baseball park caused by a change in the grade of a street, the jury cannot take into consideration estimated annual profits, or the cost of changes and improvements made in the park three years after the street had been graded.

EMINENT DOMAIN—DAMAGES FOR DELAY IN PAYMENT.—Where the claim for damages to property under the power of eminent domain is so excessive and unreasonable as to justify the defendant in refusing to pay, no allowance can be made for damages by reason of a delay in payment, since the delay is due solely to the unreasonable demands of the plaintiff.

R. Alexander and John L. Kinsey, for the appellant.

Alexander Simpson, Jr., and John I. Rogers, for the appellee.

640 GREEN, J. The solution of the questions arising upon this record is not difficult if we do but define with accuracy the rule which controls the assessments in all cases of this character. There has never been a better statement of that rule than was given in the case in which it originated. Although that decision was made seventy-eight years ago, it has proved itself equal to all the emergencies and contingencies, and all the ever-varying conditions and questions that have been developed in the almost innumerable cases that have arisen since it was pronounced. Fortunately, the original case was not one of the mere taking of land by a railroad company, and, more fortunately still, it presented and decided a question of future results which it was contended might, or would, have happened after the direct injury was inflicted. Since that day, in an infinite variety of circumstances, it has been sought to found a right of recovery upon subsequent events not in existence at the time of the injury, but which it was claimed might, or would, result with a greater or less degree of natural or probable sequence from the injurious act or appropriation complained of. But the doctrine then announced for the first time has proved to be so just, so sensible, so reasonable, and yet so entirely adequate to the proper and legitimate demands of the party injured, that it has received the constant and persistent sanction and approval of this court through all the years that have since elapsed to this very day. The case referred to is Schuylkill etc. Co. v. Thoburn, 7 Serg. & R. 411, and decided in the year 1821. The opinion was written by Mr. Justice Gibson. It was not a case of the taking of land, but of injury by the flooding of the plaintiff's land with water. It originated under the provision of the tenth section of the act of March 8, 1815, incorporating the Schuylkill Navigation Company, which gave a remedy for the inundation of land by means of dams erected in the river in the creation of the system of slack water navigation of the river Schuylkill. The plaintiff was the owner of a cotton-mill erected on, and near to the mouth of, a small stream tribu-

tary to the river, and when a dam was built in the river below the stream the water flowed upon the land of the plaintiff and into the tailrace of his mill, so seriously that the water power ⁶⁴¹ of the mill was destroyed and the owner was obliged to remove his machinery to another mill. Of course, his injury was most serious, and it was direct. One of the claims of the plaintiff was for damages resulting from the loss of his business which would occur after the injury. Another question was as to the time at which the damages were to be estimated as having been suffered, and these two were the principal contentions in the case. Mr. Justice Gibson, in the course of the opinion, thus states and disposes of these questions: "The material inquiry is, At what point of time were the jury to estimate the damages as having been suffered? Indisputably, at the time when the injury complained of was complete; which was the moment the dam was finished, or rather when the obstruction, by swelling the water, permanently produced its most injurious consequences. The principle that the extent of an injury at the time it is suffered is to govern the compensation to be received, without regard to enhancement from subsequent circumstances, is familiar and applicable to all cases which I at present recollect, where compensation is to be made in damages. . . . The compensation was to be prospective, as well as retrospective; but to be estimated with reference to the time when the injury was committed. It was, in fact, to be the price of a privilege to swell the water to a particular height for an indefinite time. Now, this price was due the moment the privilege was entered upon and the price could be ascertained, which was obviously the time when the obstruction was first completed. The jury were therefore to ascertain what was then due; and the amount clearly could not be enhanced, or in any way affected by subsequent injuries, the consequences of the obstruction. How far the omitting to instruct the jury to this effect may have operated on the amount of the compensation assessed I am unable to say, as the bills of exceptions contain no more of the evidence than is absolutely necessary to an understanding of the points submitted; but as the particular injury to the plaintiff in his business as a manufacturer was necessarily subsequent to the erection, and as the defendant prayed the direction of the court on the legal effect of the evidence relating to that part of the case, he was entitled to have it, for, so far, it would have operated in his favor. . . . The jury are to consider the matter just as if they were called on to value the injury at the

⁶⁴² moment when compensation could first be demanded; they are to value the injury to the property without reference to the person of the owner or the actual state of his business; and in doing that the only safe rule is to inquire, What would the property, unaffected by the obstruction, have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation."

It may be well enough to pause at this point before referring to other authorities to consider the application of the foregoing decision to the facts and questions arising in the case at bar. It was a case of injury and not of taking. There was a manifest, serious, and real injury inflicted directly upon the owner by the act of the defendant company. It involved, necessarily, a question of future results in depriving the owner of the business, and its profits which would occur in the future. About that aspect of the case there could be no question. But this court held: 1. That only the difference in the actual value of the entire property before and after the injury was inflicted could be considered; 2. That the time at which this difference of value was to be estimated was immediately after the injury was completed; 3. That no consideration could be given to circumstances occurring after the completion of the injury; 4. That in no event could there be any recovery for loss of profits of business resulting from the enforced abandonment of the mill and its machinery; 5. That there could be no recovery for any damages which were imaginary, speculative, or remote. All of these rulings have been repeatedly sustained and enforced ever since the Thoburn case was decided.

Applying these principles to the present case, let us inquire how it is affected by them. The plaintiff ostensibly sought to conform to at least the letter of the rulings above stated. The witnesses were asked to state what was the depreciation in the market value of the leasehold caused by the change of grade in the streets. They did this in this way. They fixed a valuation of the leasehold at the sum of \$296,000; one of them \$300,000. They then specified a number of items of damage caused by the change of grade according to their ideas, and made the aggregate of these items \$61,082. Deducting this from \$296,000 left a resulting sum of \$234,918, and that sum ⁶⁴³ they said was the value of the leasehold after the change of grade. As a matter of course, the legal sufficiency of this kind of an estimate depends absolutely upon the character of the

details which make up these aggregates. Looking at the method by which the valuation of the leasehold before the change of grade was worked, we find it consisted of a valuation of \$110,000 for all the buildings, improvements, and fixtures of the park, and \$186,000 as the value of the business to be done during the remainder of the term of the lease after the change of grade was made, to the end of the lease. It seems incredible that this method could have been allowed or could have received any kind of sanction, but a few citations from the testimony will demonstrate the correctness of the statement. The witness who invented this mode of fixing a valuation was the largest stockholder of the plaintiff company; he was the chief witness in behalf of himself and his company, and was also one of the counsel in the case for the plaintiff. He was asked: "Q. Tell us what in your judgment the market value of the leasehold of the Philadelphia Ball Club, Limited, was, immediately prior to the change of grade of Broad street? A. I valued it then at \$296,000, after careful examination. Q. Will you tell us what was the market value of that leasehold immediately after the change of grade, as affected by that change? A. I valued the leasehold immediately after the change of grade at \$234,918. Q. Making a depreciation caused by the change of grade of how much? A. \$61,082. . . . Q. The value as given by you before the change of grade includes what? A. It includes the balance of the lease which was twelve years and five months to run, and the fixtures of the ball park, consisting of all its buildings and improvements, fences, gates, ticket offices, and everything, which I knew was worth \$110,000. That included in the estimate of the whole thing I made \$296,000." According to this the value put upon the lease for twelve years and five months was \$15,000 per annum.

The method was more clearly explained by the witness, A. J. Reach, who was the president of the club. He was asked: "Q. You value the whole thing before the leasehold at \$296,000? A. Yes, sir. Q. How did you make up that value before? A. As I said a moment ago, I went to the club's office and got 644 such information as I could, knowing I was to be a witness here, and our improvements cost \$110,000, what we had at that time, our buildings and so on. In figuring over what our profits were and averaging, it would be a low estimate to figure them out what the difference would be in twelve years; in other words, something over \$15,000 a year. Q. That is, I suppose, having counted \$110,000 for fixtures, that would leave \$186,000 to be

accounted for? A. Yes, sir. Q. Then you said this leasehold runs twelve years? A. Yes, sir. Q. And you said there is a profit each year over and above what you have to pay for rent? A. I said we struck an average for a number of years. Q. The average net profit for a number of years, calculating for a number of years, would justify you in saying that there was in that leasehold \$186,000? A. Yes, sir."

Here it appears again that the valuation of the plaintiff's property consisted of \$110,000 as the value of all the physical property owned by them, and \$186,000 consisted of profits of business which were to be made in the future during a period of twelve years and five months. If this is a lawful method of assessing a property which has been injured by an exercise of the right of eminent domain, then the decision of this court in the Thoburn case was a wrong decision and ought never to have been made. For we there said: "It is evident that the profit in any branch of manufactures must mainly depend on the amount of capital invested, the number of workmen employed, and the extent of the business carried on; but it would be plainly unjust to put it in the power of the plaintiff, by an increase of all these to an amount beyond what the demand for the manufactured article would justify, to charge the defendant in the same proportion for the injury sustained by the impeding of his works in his business thus extended, as for a loss in his ordinary mode of carrying it on; that would make the defendant an insurer of ordinary profits in a new state of the business, pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual to be compensated are ascertained."

To sustain the valuation upon which the present case was ⁰⁴⁵ founded, the plaintiff in the Thoburn case should have been permitted to prove, first, the actual value of his physical property, including his land, his cotton-mill, machinery, and all his other tangible property, real and personal, and, in addition to that, to prove what the annual profits of his business were, and then to add the principal sum which those profits would represent at six per cent interest to the value of the physical property, and this court would have been bound to declare that the aggregate of these sums was the value of the plaintiff's property before the injury was inflicted. But we not only did not do that,

and thereby sanction such an absurd proposition, but declared that the future profits of the plaintiff's business were not to be considered for any purpose whatever, not even to show the diminution in the value of his property by showing the loss of his future profits, when he was actually driven out of his mill and compelled to quit doing any business there. As a matter of course, this manner of adding to the value of the actual property the value of future profits, which are entirely uncertain and may never be realized, was altogether illegal, and should never have been permitted. But bad as this feature of the plaintiff's case was, it was no worse than the other details of what the witnesses chose to describe as damages suffered by the change of grade. When asked to state how the \$61,092 of loss was made up, they said it was composed in part of \$38,082 depreciation in fixtures, \$13,000 depreciation in the value of the leasehold and \$10,000 for detention of payment. In making up the \$38,082 item, they said it was composed in part of \$6,589.63 for regrading the ball field, \$9,871.26 for rebuilding right-field seats, \$15,543 for rebuilding walls and fences, \$1,267 for loss of gate, \$1,627 for cost of fences and a number of smaller items. It is only necessary to deal with the larger items.

The depreciation in the value of the leasehold when described by the witnesses represented twelve years' loss at \$1,000 per year, resulting from a supposed diminution in the receipts of the business, because the drainage after the change of grade was not as perfect as it was before the change. As a matter of course, no such testimony could be permitted either before or after such a result occurred. But in point of fact there was not a particle of testimony to show that there was any diminution of actual receipt to that amount, and it was all a mere "guessing estimate of what the loss of profits would be on this account during the whole of the remaining twelve years of the lease. In addition to this, it was affirmatively proved by the plaintiff's witnesses that instead of a falling off of business during the years following the change of grade, from this or any other cause, there was an actual and large increase in the business. It was represented by the attendance of spectators in constantly advancing numbers, as follows: In 1892 the attendance was 197,574; in 1893 it was 293,924; in 1894 it was 352,773; in 1895 it was 414,891; in 1896 it was 357,025. We dealt with this subject when this case was here before (*Philadelphia Ball Club v. Philadelphia*, 182 Pa. St. 362), and then said "Now, upon comparing the business of 1893 with that of 1892,

it will be found that there was a gain of very nearly fifty per cent over the business of 1892. The business of 1894 showed a gain of just about sixty-five per cent over the business of 1892, and of ten and six-tenths per cent over that of 1893. The business of 1895 showed a gain of more than one hundred per cent over that of 1892, and a little rising of twenty-three per cent over that of 1894. In this state of the testimony, it is absolutely established by the affirmative and uncontradicted evidence of the plaintiff that there was not only no loss of business resulting from the change of grade, but a very large increase of business between the time before and after the change of grade. . . . In this particular case, we find there was a positive and very large increase in the business of the club after the change. Hence it is not true that there was or could be a diminution in the value of the plant on account of a loss of business, for the simple reason that there was no loss."

On this subject of the loss from inferior drainage, Mr. Rogers, the principal witness for the plaintiff, gave his views of the loss resulting from this source in the following manner: "After those things were done, or ought to have been done, the leasehold estate was depreciated, in my opinion, at least \$13,000. Ten thousand dollars of that, I think, is a conservative estimate as to its injury by reason of the drainage being still very much inferior to the surface drainage that we formerly enjoyed." On cross-examination he said: "The \$10,000 was after we had fixed our grounds in the best possible way; we have still a ground, that is a baseball lease of ground, for twelve years and five months, that is worth in the market at least \$10,000 ⁶⁴⁷ less to a purchaser than it would have been if we had surface drainage."

As the witness gave no explanation of his opinion except loss of business, he was asked as to how the business was after the change in the grade of the street was made and before the change in the grade of the field. He said, "The regrading of the playing field began in November or October, 1895, but we did not finish it." He was asked: "Q. You played ball through the year 1893, the change of grade commencing in August, 1893? A. Yes, sir. Q. You did not miss a day during that year, did you? A. The balance of that year? No, I think not. Q. You played ball there the year 1894, did you not? A. Yes, sir, except on certain days when the condition of the ground did not let us. Q. There were three days you have stated during the year 1894 when you did not play ball? A. Three days when

we were at home that we would have played but did not play. Q. You played ball all through the year 1895 with the exception of one day? A. One day. . . . Q. How many days were you unable to play in the year 1896 on account of defective drainage? A. The club played every game it was scheduled to play in 1896. Q. How many games were you unable to play in 1897 on account of defective drainage? A. One."

Thus it seems that no day was lost in 1893, three days were lost in 1894, one day in 1895, none at all in 1896, and one in 1897. For this the city is asked to pay a sum of \$10,000, by the testimony of this witness, and \$15,000, by that of Shetzline, who was the secretary of the club, because the leasehold would be worth that much less, by reason of the loss of business, when, in point of fact, the business of the club steadily and largely increased during all the years until 1896. In 1896 and 1897 there was a falling off in the business and Mr. Rogers explained just how that occurred. He said: "The attendance at our ball games depends mainly on two circumstances, the most important of which is the luck of winning games after a close competition. If you have a close competition with the other clubs, and can win your share of games, the public come out in crowds. If you do not, they religiously stay away in crowds. That is the most important. The next important is having a place where it is the center of transportation facilities. That is the center of all transportation facilities of this town, having the two main ⁶⁴⁸ railroads and all the trolley-cars congregating there. . . . In 1896 we played very poor ball indeed, very wretched, and our attendance went down. In 1897 we did even worse, and our attendance went down." From this testimony it is apparent that loss of business is due to the quality of the play, and that the loss in 1896 and 1897 was due to the bad playing, while the business constantly advanced during all the years from 1893 to 1895, both inclusive, notwithstanding the condition of the drainage. It follows hence that any inference as to the value of the business at times posterior to the change in the grade of the streets has not the least importance which the law can recognize in the determination of the question of the difference in the value of the property affected before and after the infliction of the injury. The writer has gone into the analysis of this testimony, not for the sake of showing what the real value of the business done on this property in the years succeeding the change in the grade of the streets was, but for the purpose of illustrating the wisdom of the rule which prohibits all such

inquiries in cases of this kind. The business to be done in the future on, or with, a property which is taken or injured under the power of eminent domain, is uncertain, remote, imaginary, entirely incapable of being determined with truthfulness, and the testimony on such subjects is the result of the personal interest or the friendly bias of the witnesses, and hence necessarily and absolutely unreliable. Ever since the decision of the Thoburn case all such inquiries and all such evidence have been positively prohibited, and cannot in any circumstances be permitted to affect the decision of such cases as this. The underlying principle upon which such damage questions must be determined necessarily precludes the consideration of such testimony. For it is a fundamental proposition that the valuation of the property affected must be made immediately before and immediately after the property is taken or the injury is inflicted, and the difference in those valuations is the measure of the damages which the owner may recover. In the present case, the change in the grade of the streets was made in August, 1893, and the value of the leasehold at that time, as contrasted with its value in the spring of 1892, when the work was commenced, must represent the damages to which the plaintiff is entitled. It was proved by the plaintiff's witnesses that the 649 ball playing went on during the years 1893, 1894, and 1895, just as it had been conducted previously to that time, without any change in the grade of the field, and with a largely increasing business. It was not until three seasons had been finished that any changes were made in the field, and after that time the work was done for which the very large damages in question are now claimed. As a matter of course, these works and improvements, being long subsequent to the change of grade, could not lawfully have entered into the computation of the leasehold in 1893, for the very simple reason that nothing could be known about them at that time—they were long subsequent at the time of their occurrence. They were not at all a matter of necessity, but of mere improvement of the conditions of the field. The grade of the field was changed in the latter part of 1895, after the season had closed, and for this the plaintiff demands that the city shall pay as damages \$6,589.63. There is no principle in the law upon this subject upon which this claim can be sustained. As the case was tried the jury was allowed to award the whole amount of this work as specific damages for the change in the grade of the streets made three years before. It is too plain for argument that no part of it can be allowed,

either specifically as the cost of so much work done, or as entering into the value of the leasehold at the time the grade of the streets was changed. If such a claim could be allowed for work done at the end of three years, there is no reason why it could not be allowed for work done at any time afterward during the pendency of the lease. We rule now distinctly and positively that the whole of this claim must be rejected in any subsequent trial of this case. The same is true with increased force as to the claim for \$9,871.26 for rebuilding the right-field seats. These seats were continued in use after the change of grade in the streets precisely as they had been before, until in August, 1894, when they took fire and were destroyed. They were at once rebuilt as they had been before and remained in use during 1894, 1895, and 1896. In 1896, the club decided to build an entirely new system of seats on a larger and much more expensive scale. They accordingly did so at an expense of \$38,000, and they now claim that the city should pay one-fourth of this sum, \$9,800, upon the theory that it would have cost that much to rebuild the part which was required by the ~~650~~ change of grade. This work was not commenced until 1896, and finished in 1897, long after the present proceeding was begun, and several months after the first verdict was rendered. This work was done by the plaintiff for its own convenience and for the purpose of improving its business by making the field more attractive. It had nothing on earth to do with the change of grade in the streets, and in no conceivable point of view can a single dollar of this claim be allowed, or be permitted to affect the valuation of the leasehold in 1893, immediately after the change of grade in the streets. It must all be rejected for any purpose whatever.

Another claim was made on the trial which, if possible, is more indefensible than any of the others. It is a claim for \$10,000 for detention of payments, on the theory that the plaintiff suffered damages on that account, and was entitled to be paid that amount in lieu of interest. If the plaintiff suffered any damage on this account, it has nobody but itself to hold responsible for that result. It would have been a plain dereliction of duty on the part of the city officials if they had paid, without a contest in the courts, the grossly excessive and unreasonable demands of the plaintiff. In the former trial, the claim was for \$85,000, and it was sought to be supported by theories and testimony of such an illegitimate character that we were obliged to reverse the judgment, although the jury only

allowed \$29,000 by their verdict, thus condemning the whole of the demands in excess of that sum. On the last trial, other theories and testimony were set up in support of a demand for \$62,000, quite as indefensible and unreasonable as the demand on the first trial. The jury on the last trial refused all of the claim over \$39,000, and the court below struck out all over \$30,000. It is therefore manifest that it is the oppressive and unreasonable demands of the plaintiff that have caused the delay in the payment of the damages really sustained by the plaintiff. As a matter of course, there can be no recovery of any sum whatever for such a claim in such circumstances, and the whole of this claim must be rejected. It was error to leave such a question to the jury at all. In *Richards v. Citizens' National Gas Co.*, 130 Pa. St. 37, our Brother Mitchell, in commenting upon claims of this character, and speaking for the whole court, said: "Interest is recoverable of right, but compensation for ⁶⁵¹ deferred payment in torts depends on the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay. Or in other ways the delay may have been the plaintiff's fault. . . . In such cases, the jury probably would not, and certainly ought not, to make the allowance." It is altogether likely that when the two persons who own the majority of the stock of the plaintiff company can make up their minds to accept a fair and reasonable sum for their claim an adjustment will quickly follow. But it must not be expected that the imaginary, remote, speculative, and illegitimate demands that have thus far been set up, or any others of like character, will ever receive the sanction of this court. There are other objectionable items in the plaintiff's claim, but, as they are not covered by any of the assignments of error, we do not discuss them. The fundamental method which was adopted to establish the difference of value in the leasehold before and after the change of grade is radically vicious and fallacious. Fixing a valuation before the change by adding the anticipated profits of twelve years and five months in the future to the value of the physical property is so glaringly and violently in opposition to all our decisions that it must be entirely rejected in any future trial of the case. Then the method of building up an extravagant mass of items of alleged damage, nearly all of them based upon future transactions, remote, imaginary, speculative, and altogether illegal, and naming the aggregate of all of these as the difference in the value of the leasehold before and after the change of grade, is so certainly contrary to the law of this commonwealth that it cannot possibly be sustained.

Some reference to a few of our more modern decisions will be appropriate in this connection. In the case of *Watson v. Pittsburg etc. R. R. Co.*, 37 Pa. St. 469, we said, speaking of the claim of the plaintiff: "He was allowed the benefit of the rule laid down in *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411, that the true measure of compensation is the difference between what the whole property would have sold for, unaffected by the railroad, and what it would have sold for as affected by it. Nor was the advantage of this rule in any degree taken from him by the rejection of the evidence which he offered. His attempted mode of proof of the difference between the two values was entirely inadmissible, and hence was the reason for ⁶⁵² the rejection of the evidence. His offers all had the same fault. They proposed to submit to the jury the conjecture of the witnesses as to what the plaintiff's lands would be worth at some unknown future time, when the railroad shall have been constructed. Such testimony does not rise even to the standard of an opinion. It is a mere guess, with no substantial foundation upon which to rest. . . . An estimate of what property will be worth at a future day, or in an altered condition, is entirely without guide or measure, and must be wholly fanciful." In *Hornstein v. Atlantic etc. R. R. Co.*, 51 Pa. St. 87, decided in 1865, we said: "If judicial authority can fix any rule, the series of adjudged cases from *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411, down to *Harvey v. Lackawanna etc. R. R. Co.*, 47 Pa. St. 434, has established the measure of damages for building a railroad through a man's land to be the difference betwixt the value of the land before the road was built and its value after the road is finished. In estimating the disadvantages resulting from the road, consequential or speculative damages are to be rejected." In *Shenango etc. R. R. Co. v. Braham*, 79 Pa. St. 447, decided in 1875, we said: "In one of the early cases upon this subject (*Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411) it was held by this court that the jury should consider the matter just as if they were called upon to value the injury at the moment when compensation could first be demanded; they are to value the injury to the property without reference to the person of the owner, or the actual state of his business, and in doing that the only safe rule is to inquire what the property unaffected by the obstruction would have sold for at the time the injury was committed. What would it have sold for as affected by the injury? The difference is the measure of the compensation. This rule has been followed in *Pennsylvania Ry.*

Co. v. Heister, 8 Pa. St. 450," and a large number of other cases, citing them. "In none of these cases is there any authority for the doctrine that the value of the land is to be limited to, or measured by, a particular use." In Pittsburgh etc. R. R. Co. v. Patterson, 107 Pa. St. 461, we said: "But the court was certainly correct in saying that the jury could not take into consideration any supposed loss to the plaintiff of profits in his business. Such an assessment would be merely speculative, and a rule which justified it would lead to most ruinous results." In Pittsburgh etc. Ry. Co. v. McCloskey, ⁶⁵³ 110 Pa. St. 436, decided in 1885, we said: "In estimating the damages to a landowner, caused by the construction of a railroad, the rule as to the measure of damages, declared by Judge Gibson in the case of Schuylkill Nav. Co. v. Thoburn, 7 Serg. & R. 411, has ever since been recognized and followed," stating the rule. "Merely speculative damages cannot be allowed. . . . The jury cannot include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters thus sought to be provided against are in their nature altogether ideal and fanciful. . . . The estimate of a merely prospective injury can be founded in no rational or correct legal principle, and cannot therefore be allowed." In Pennsylvania etc. Ry. Co. v. Cleary, 125 Pa. St. 442, 11 Am. St. Rep. 913, there is a good illustration of the application of the rule to those subjects which are proper, and those which are improper to be considered by the jury: "The true measure of the damages sustained by any given lot of land is found in the difference between its selling value before and after the injury complained of. It is proper to consider for what purpose it may be used to advantage, in order to determine for what price it will sell. It may be salable as a site for the erection of a hotel, a factory, a dwelling, or a wharf, but it is not proper to lay before the jury proof of what the hotel or other structure would cost, together with proof of the value of the lot with such structure upon it, and treat the difference between these sums as the value of the lot. Such a method would be speculative and fanciful. Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted, but it is the tract, and not the lots into which it may be divided, that is to be valued. . . . The jury are to

value the tract of land, and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. . . . They [the jury] are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in." ⁶⁵⁴ In *Schuykill etc. R. R. Co. v. Stocker*, 128 Pa. St. 233, we said: "The proper and legitimate inquiry in all these cases is, What was the actual market or selling value of the property, just as it was immediately before the land was taken for the railroad, and what was its same value after the completion of the road? Of course, the possible uses of the ground may be considered and estimated by the witness in forming his opinion, but it would be highly dangerous to permit verdicts to be founded upon a consideration of future speculative operations which may never transpire, and whose results, whether profitable or otherwise, cannot be known in advance."

When this case was here before (*Philadelphia Ball Club v. Philadelphia*, 182 Pa. St. 362), we said: "But in a mere legal sense, and that is the way we are obliged to view it, the radical and fatal vice of the contention we are now considering is, that it is entirely too remote, altogether imaginary and purely speculative to the last degree. All the elements of certainty in deductions are absent. They exist only in the future and therefore cannot be known, they depend upon variable and uncertain conditions, and they cannot possibly form the basis of a sound and reliable judgment." These authorities might be multiplied, but it is not necessary. We are clearly of opinion that all the assignments of error must be sustained.

Judgment reversed and new venire awarded.

EMINENT DOMAIN.—THE MEASURE OF DAMAGES to property injured through the exercise of the power of eminent domain is the diminution in the value of the property: *Elizabeth etc. R. R. Co. v. Combs*, 10 Bush, 382, 19 Am. Rep. 67; notes to *Currie v. Waverly etc. R. R. Co.*, 19 Am. St. Rep. 459; *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 118.

EMINENT DOMAIN—DAMAGES, SPECULATIVE AND CONSEQUENTIAL.—In determining the amount of compensation to which an owner is entitled for an injury to his property under the power of eminent domain, speculative damages cannot be considered; only those circumstances can be taken account of which immediately deprecate the value of the property: Note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 120. Yet the appraisal in such a case should embrace all present, past, and prospective damages which may be known or may reasonably be expected: Note to *Ohio etc. Ry. Co. v. Wachter*, 5 Am. St. Rep. 537; *Elizabeth etc.*

R. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67. Compare *Brooks v. Cedar Brook etc. Imp. Co.*, 82 Me. 17, 17 Am. St. Rep. 459.

EMINENT DOMAIN—DAMAGES—DELAY IN PAYMENT.—Interest should be allowed on damages awarded for land taken for a street where such amount remains unpaid for two years after being made: *Chicago v. Wheeler*, 25 Ill. 478, 79 Am. Dec. 342; note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 121.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

SHARP v. STATE.

[102 TENNESSEE, 9.]

PARDONS—CONTEMPTS.—The pardoning power of the governor of a state extends to cases of imprisonment for contempt of court.

CONTEMPTS—PARDONS.—A judgment imposing fine and imprisonment for contempt of court is a "conviction" within the meaning of a constitutional provision authorizing the governor to grant pardons "after conviction."

R. Vaughn and J. A. Pitts, for the petitioner.

Steger, Washington & Jackson, and Estes & Estes, for the state.

⁹ McALLISTER, J. This record presents the single question of the right of the governor to exercise ¹⁰ the pardoning power in respect of fines and imprisonment imposed for contempt of court.

It appears from the record that one W. A. Cason was under indictment in the criminal court of Davidson county for making false and fraudulent entries in the books of his employers. When the jury was being summoned by an officer of the court for the trial of W. A. Cason, his father, J. D. Cason, sought to have certain individuals, whose names were handed the officer, summoned. This misconduct on the part of J. D. Cason was reported to the judge, who, upon investigation of the facts, adjudged the contemnor guilty of an attempt to pack the jury, and fined him fifty dollars and sentenced him to jail for a period of ten days. It appears that the court suspended its judgment

in the case from June 20 until July 9, 1898. On the eighth day of July, 1898, the governor pardoned the said J. D. Cason of said offense.

The judge of the criminal court, conceiving that the pardoning power of the executive did not extend to cases of contempt, refused to recognize the pardon and ordered the prisoner into custody. Thereupon the prisoner, through his counsel, applied to the circuit court for the writ of habeas corpus. Upon an investigation of the case the circuit judge was of opinion the prisoner was entitled to his liberty, and he was accordingly discharged. The sheriff appealed, and has assigned as error the action of the circuit court in discharging the prisoner.

¹¹ The precise question here presented was adjudged by this court, at its December term, 1893, in the case of *Garrett v. State* (oral opinion), in which it was held that the pardoning power of the governor does extend to cases of contempt. A similar ruling had been made by our predecessors in the case of *McCarty v. State* (oral opinion). Article 3, section 1, of the constitution provides that: "The supreme executive power of the state shall be vested in a governor." Section 6 provides, viz.: "He shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment."

It will be observed that the only exception to the power conferred upon the governor to grant reprieves and pardons is in cases of impeachment, and the only limitation imposed is that the power cannot be exercised until after conviction. A judgment imposing a fine and imprisonment for contempt is a conviction, within the meaning of the constitution: *Sinnott v. State*, 11 Lea, 281; *Harwell v. State*, 10 Lea, 544; *New Orleans v. Steamship Co.*, 20 Wall. 387-392; *Fischer v. Hayes*, 6 Fed. Rep. 64; 3 Am. & Eng. Ency. of Law, 796. Contempts of court are public offenses, and pardonable as such: 1 Bishop on Criminal Law, 913, subsec. 2; 1 McClain's Criminal Law, 9; *Ex parte Hickey*, 4 Smedes & M. 751; *State v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115; *In re Mullee*, 7 Blatchf. 23; *Bates' Case*, 55 N. H. 325; *State v. Matthews*, 37 N. H. 12 450; *In re Sims*, 54 Kan. 1, 45 Am. St. Rep. 261; *In re Manning*, 44 Fed. Rep. 275.

In the case of *State v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115, Judge Taliaferro said: "There being no exception found in our state constitution precluding in such cases the exercise of the pardoning power by the governor of the state, we feel no hesitancy in recognizing its existence. That the offense arising from contempt of the authority of a court is one

which, from its nature, should be summarily punished, to the end that an efficient and wholesome exercise of judicial power may be had, no one will question. A contempt of court is an offense against the state and not against the judge personally. In such a case, the state is the offended party, and it belongs to the state, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender."

Again in *Ex parte Hickey*, 4 Smedes & M. 751, the court said, viz.: "The whole doctrine of contempt goes to the point that the offense is a wrong to the public, not to the person of the functionary to whom it is offered, considered merely as an individual. It follows, then, that contempts of court are either crimes or misdemeanors in proportion to the aggravation of the offense, and as such are included within the pardoning power of the state," and the prisoner was discharged.

It appeared in that case that Hickey had been ¹³ sentenced to fine and imprisonment for contempt of the circuit court at Vicksburg, and was pardoned by Governor Albert Gallatin Brown. The prisoner was released upon habeas corpus, the court sustaining the right of the governor to exercise the pardoning power in such a case.

In *In re Mullee*, 7 Blatchf. 23, 17 Fed. Cas. 969, Judge Blatchford, district judge, said, viz.: "On motion for an attachment against the applicant as a defendant in a suit in equity in this court, he was adjudged to have been guilty of a contempt of this court by violating an injunction issued by this court, and, on June 27, 1868, a fine of two thousand five hundred dollars was imposed on him as a punishment for such contempt, and it was ordered that he should stand committed until the fine should be paid. After having been imprisoned for some time under such sentence, he presented a petition to this court, praying for his discharge on the ground that he was unable to pay the fine. The decision of the court thereon was that it had no jurisdiction or power to grant the prayer of the petition, and that relief must be sought by an application to the President of the United States. I then said: 'By the constitution, article 2, section 2, subsection 1, the President is invested with power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.' No such power is conferred upon any other officer or upon any court. A contempt of court is an offense against the ¹⁴ United States. In the present case, there is a judgment judicially declaring the contempt an offense. In the case of one Dixon a fine was imposed upon him by the cir-

cuit court of the United States for the district of Mississippi for a contempt of court. He applied to the President for a pardon. The attorney general, Mr. Gilpin (3 Op. Atty. Gen. 622), decided that the pardoning power extended to such a case, and that the contempt was an offense within the language of the provision of the constitution. I fully concur in this view, and it necessarily follows that if the power of relieving from the sentence imposed on Mullee falls within the pardoning power of the President, it is exclusive in the President, and cannot be exercised by this court."

The inquiry made of the attorney general in the case of Dixon was whether the executive authority to pardon properly extended to that case. In his opinion, given to the secretary of state, in February, 1841, the attorney general says: "If we adopt, as the supreme court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President. I am therefore of opinion that, should the President consider the facts such as to justify the exercise of his constitutional ¹⁵ power to grant reprieves and pardons for offenses against the United States, there is nothing in the character of this offense which withdraws it from the general authority."

After a careful review of the authorities, we are thoroughly satisfied with the former rulings of this court on this subject, and the judgment of the circuit court is therefore affirmed.

PARDONS—CONTEMPT.—The governor of a state has power to pardon for contempt: *State v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115. Regarding the President's power to pardon for contempt, see cases cited in the note to *Burns v. Allen*, 2 Am. St. Rep. 862.

FOSTER v. STATE.

[102 TENNESSEE, 33.]

HOMICIDE—RIGHT OF SON TO DEFEND FATHER.—If a son honestly believes, on reasonable grounds, that a deadly assault is being made on his father, who is fighting in self-defense, and that, owing to the superior power of his antagonist, he may be killed or receive great bodily harm as the result of such assault, it is the legal right of the son, as well as his filial duty, to interfere and prevent the killing or maiming of his father, and to use such means as are necessary, under all of the circumstances, to effect this purpose, and if, in so doing, he kills his father's antagonist, he is not guilty of murder in the second degree. In such case, the killing is justifiable.

HOMICIDE—SON'S DEFENSE OF FATHER—EVIDENCE. On a trial of a son for killing his father's antagonist while the father was acting in self-defense, previous acts of hostility and demonstrations, made by the deceased toward the father, and coming to the knowledge of the son, and decedent's conduct and demeanor toward the father, are admissible in evidence, as tending to show whether the son had reasonable grounds to believe that the deceased was making a deadly assault upon the father, and would kill him or do him great bodily harm, unless by some summary means he was prevented. In such case, it is error to reject testimony as to who was the aggressor in such previous difficulty and what demonstrations were made on that occasion by deceased, especially if they were seen by, or came to, the knowledge of the defendant.

J. T. Allen and F. Rivers, for the appellant.

G. W. Pickle, attorney general, and J. L. Coffman, for the state.

³⁴ **WILKES, J.** A. T. and Morgan Foster are father and son. The father is a man of about fifty-nine years of age; the son is a boy of sixteen. They were indicted for the killing of R. W. Woodard. The father was acquitted. The son was convicted of murder in the second degree and sentenced to ten years in the state penitentiary, and has appealed.

The deceased, Woodard, was a vigorous man about thirty-five years old, and estimated to weigh from one hundred and fifty to one hundred and eighty pounds. Both Woodard and the elder Foster were wagoners and log haulers. There had not been good feeling between them for some time. It appears that they, while driving their wagons and teams in opposite directions, met in the public road, when they, instead of passing, blocked each other in the way. Some words ensued. Both parties left their wagons and went back toward Marbut's, a postoffice on the road near by. In passing down the road the deceased came up to a lot of boys, white and black, who were having

some music and dancing in the road. It was Christmas times, December 27, 1897. Among these boys, and taking part in the frolic, was Morgan Foster. Deceased, on approaching the boys, pointed to the elder Foster, who was coming on behind him, and said, "Boys, ³⁵ if you want to see a grand rascal, look up the road," pointing toward the elder Foster. The son heard the remark, and demanded to know of deceased what it was he said, to which the deceased replied: "You are a minor, and I'll have nothing to do with you," and passed on.

The son, it appears, caught the purport of what the deceased had said, but not the language. The son then started toward his father's wagon to help get it by the deceased, when his father intercepted him and told him to let the team alone. In the meantime, the deceased was returning along the road and met the elder Foster still on his way to Marbut's. He accosted Foster and said: "Did you call me a son of a b—h at the wagon?" to which the elder Foster replied, "I did."

Woodard then assaulted the father and had him to his knees, and was choking, or attempting to choke, him, and was striking him over the head, whether with a knife or with his fist the son says he could not tell. The son ran up and demanded of Woodard that he desist and told him twice to hold up. Woodard persisted in the assault. It is shown that he was physically able to handle both of the Fosters. The elder Foster was not robust, and was, besides, a cripple. The son, after calling to Woodard once, and according to some of the witnesses twice, drew a pistol and fired at deceased and shot him, the ball entering the eye and killing him. The boy then went up the road a short distance to his ³⁶ father's home, at the suggestion of his father, and was soon afterward followed by two deputy sheriffs. When they entered the premises the boy ran out the back way and tried to make his escape to some bushes near by, when one of the officers shot him in the neck and head, putting out his right eye.

The deceased had the character of being somewhat quarrelsome and had had several fights. Upon this point, however, there is a conflict of testimony. The father testified that he was entirely powerless in the struggle with the deceased and believed he was in danger of losing his life; that he did not strike deceased, because the fierce assault gave him no opportunity; that he did not see his son or know that he was taking any part in the struggle until he heard the pistol shot and felt the deceased relax his hold upon him. The boy testified that

he honestly believed his father was in danger of being killed or of receiving great bodily harm and shot in his defense, believing it to be necessary to save his father's life. The elder Foster was, upon these facts, acquitted of any offense. It is evident that if the son was guilty of any offense it was not of murder in the second degree, but of a much less offense, and the cause must be reversed and remanded for a new trial.

It appears that some time before this difficulty there had been another difficulty between the deceased and the elder Foster at Marbut's store. Deceased was at the store when Foster came up. The ³⁷ latter was on horseback. He had been for some time going on crutches in consequence of a broken limb, but did not have his crutches with him on this occasion. The deceased and Foster had some words in regard to an account and settlement between them, in which the deceased characterized several items in Foster's account as lies. There was testimony offered tending to show that the deceased started to attack Foster and attempted to drag him from his horse, but was prevented from doing so by the bystanders. He made threats against him and said he and Foster could not live in the same county, and he would get his gun and kill him. The son was off a short distance, and, from the affidavits on application for new trial, it appears saw the difficulty, but took no part in it. The trial judge declined to allow witnesses to prove the actions and demonstrations of the deceased toward Foster at this time, but permitted them alone to prove that Foster and deceased had a difficulty on the occasion. This, we think, is manifest error. Every circumstance that tended to throw light upon the state of mind and apprehension the defendant was under when he went to his father's relief was not only competent but vital to the crucial question in the case, and that is whether the son was justified in believing it was necessary to interfere in order to save his father's life. The acquittal of the father raises a conclusive presumption that he was guilty of no wrong in this difficulty with deceased. ³⁸ This being so, if the son really believed, on reasonable grounds, that a deadly assault was being made upon his father, and that, owing to the superior power of his antagonist, he would be killed or receive great bodily harm as the result of the assault, it was his legal right, as well as his filial duty, to interfere and prevent the killing or maiming of his father, and to use such means as were necessary, under all the circumstances, to effect this purpose.

Previous acts of hostility and demonstrations, if any, made

by the deceased toward the father, and coming to the knowledge of the son, and his conduct and demeanor toward him, were important as showing whether the boy had reasonable grounds to believe the deceased was making a deadly assault upon his father, and would kill him or do him great bodily harm unless by some summary means he was prevented. It was error to reject the testimony as to who was the aggressor in this previous difficulty, and what demonstrations were made on that occasion by deceased, especially if they were seen or came to defendant's knowledge.

We do not mean to in any way justify or excuse the defendant for going armed contrary to law. It was an offense to have a pistol upon this occasion, as he did, and for that he might have been punished. But the offense of going armed is one entirely different from the crime committed by using the pistol in an assault upon another, and it is only for ³⁹ this latter offense the defendant is on trial before us. The carrying of the pistol is important in this case only as bearing upon the question of malice, but the record fully shows that defendant was not wearing it with any expectation of using it in committing any assault, and none that he was wearing it with the purpose of using it on the deceased. It was a boyish indiscretion of which, unfortunately, too many young men are guilty.

The judgment is reversed, and cause remanded for new trial.

HOMICIDE—RIGHT TO DEFEND LIFE OF ANOTHER. Whatever one may do in his own defense, another may do for him, even to killing, if he believes life is in immediate danger, or if such danger and necessity be reasonably apparent, provided the party in whose defense he acts is not in fault: *Stanley v. Commonwealth*, 86 Ky. 440, 9 Am. St. Rep. 305; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370. One may take life in defense of his wife, when she is being assaulted and beaten: *Estep v. Commonwealth*, 86 Ky. 39, 9 Am. St. Rep. 260; so may a man in defense of his daughter kill her husband: *Campbell v. Commonwealth*, 88 Ky. 402, 21 Am. St. Rep. 348.

HOMICIDE—EVIDENCE OF PREVIOUS VIOLENCE.—Where a man, in defending his daughter, kills her husband, evidence of the husband's former acts of violence toward his wife is admissible in establishing self-defense: *Campbell v. Commonwealth*, 88 Ky. 402, 21 Am. St. Rep. 348. The threats and bad character of the deceased are admissible where the defendant sets up self-defense: *Note to State v. Turner*, 13 Am. St. Rep. 710, 711.

McKINNEY v. NASHVILLE.

[102 TENNESSEE, 131.]

EMINENT DOMAIN—MEASURE OF DAMAGES.—In estimating the value of property taken for a public use, it is the market value which is to be considered, and, in estimating such value, all of the capabilities of the property and all of the legitimate uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in and the use to which it is at the time applied by the owner.

EMINENT DOMAIN—MEASURE OF DAMAGES—UNLAWFUL USE.—If, in estimating the value of property taken for a public use, it is shown that its rental value has been inflated by an unlawful use, such rental value, to the extent of the inflation, must be discarded as evidence of the value of the property.

E. H. East, for the appellant.

Price & McConnico, for the appellee.

¹³¹ BEARD, J. This is a condemnation proceeding instituted by the municipal authorities of Nashville. ¹³² The right to condemn the property in question is conceded by its owner, the plaintiff in error; the controversy is as to the rule for ascertaining value submitted by the trial judge. In his charge to the jury he said: "In considering the uses for which the property was adapted, you must consider all legitimate purposes for which it may be used, and must not confine yourselves to any one special or particular use as going to indicate its value." And again: "You will consider its location and publicity, its situation with reference to the Public Square and Deaderick street, and its vicinity to other property used for business or other purposes. You will also consider the adaptability of the property to any and all legitimate purposes to which it might be applied and its rental value for any and all such legitimate purposes, as well as other elements of value developed by the proof," in fixing the compensation to which the owner of the property was entitled upon its appropriation to a public use.

The record disclosed that this property was more valuable, by reason of location, for saloon purposes than any other, and that at the time of the institution of the present proceedings it was under lease for a term of five years for a good annual rental, and was then used to carry on a saloon business. In view of this condition, the contention of plaintiff in error is best stated in the words of his counsel, taken from his brief and argument, which are as follows: "If a saloon-keeper, because of the location ¹³³ of property, its adaptability to his intended

uses, will give more for it than another whose occupation is different can afford or will give, looking to his intended use for it, why should the owner not receive the highest value which anyone would give for the property? I do not mean this highest value for one use should be considered in connection with its value for other uses in order to diminish its value, but that it constitutes its value—is its value in the market.” And again: “Instead of saying to the jury you must consider all legitimate purposes for which it might be used, he should either have said to the jury the owner has a right to its value for the use for which it would bring the most in the market, or that they should value the property on the basis of its most valuable use.”

These paragraphs, taken from the instructions of the trial judge and the argument of the counsel criticising them, present sharply the issue on this point which is presented for our determination. On this issue we do not hesitate to approve the charge of the trial judge.

Lewis, in his work on Eminent Domain, section 478, says: “In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its ¹³⁴ value, all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in at the time and the use to which it is applied by the owner.” To this text many cases are cited by the author. One of these cases is *Mississippi Bridge Co. v. Ring*, 58 Mo. 491, in which the court say: “The correct rule to be applied relates to the value of the land to be appropriated, which is to be assessed with reference to what it is worth for sale in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to have it.”

Nor do we find the authorities relied upon by plaintiff in error to support his contention out of line with the rule thus announced, with one possible exception. We will now examine these authorities.

In *Chicago etc. R. R. Co. v. Jacobs*, 110 Ill. 414, the trial court had said to the jury, as is insisted should have been done in this case, “that the owner of property to be condemned is entitled to its actual value for its highest or best use to which

the property could be put, and in case" it "has an actual value for a specified use, and that such property is devoted and adapted to such use, then the owner is entitled to such value." On appeal, this was held to be error, and the supreme court said: "The jury should have been instructed in such a way that they would look to the market value ¹³⁵ of the property. But the instruction opens up a wider field of investigation. It was a fair invitation to the jury to enter into another field of inquiry as to the value of the lots—to ignore the market value and determine the actual value for a specified use." The case was, therefore, reversed for this error of the trial judge.

We think this statement of that case shows it to be in the face of the insistence of plaintiff in error and places it in line with the text of Mr. Lewis.

The case of Gardner v. Brookline, 127 Mass. 358, so far as we can see, does not shed any light on this question; but the case of Johnson v. Freeport etc. Ry. Co., 111 Ill. 414, seems to furnish authority for the contention of plaintiff in error. In that case, upon the trial below, the court had excluded evidence, offered by the owner of the property which it was sought to have condemned, that it had a special value for railroad purposes—and it was for these purposes condemnation was sought—beyond its general market value. The supreme court held this ruling to be error, and say: "If property has a special value, from whatever cause, that value belongs to the owner, and he is entitled to be paid for it by the party seeking compensation."

The opinion in this case was delivered at the November term, 1884, by the court, composed of the same judges which announced the opinion in the case of Chicago etc. R. R. Co. v. Jacobs, 110 Ill. 414, ¹³⁶ at the immediately preceding spring term. It is hardly to be supposed this latter case was overlooked, and yet it is not mentioned in that opinion. Nor do we believe it was intended to overrule it sub silentio, and establish a new general rule. On the contrary, we are satisfied, from the description of the property found in the opinion, that it was a strip of ground valuable largely, if not exclusively, for railroad purposes, and therefore without any general market value, and that the court simply intended to protect this exceptional property to the owner by applying a measure of compensation which gave to the owner the full equivalent of this exceptional use. If this be the interpretation, then it is in harmony with a number of other cases, and it does not conflict with the general rule as to market value.

Plaintiff in error relies also upon the statement of Mr. Randolph, in his law of Eminent Domain, section 249, that "the property must be valued at its most profitable use." To this text the author cites alone the case of Goodin v. Cincinnati etc. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95. The opinion in that case does not support the author's text, at least as it is interpreted by the plaintiff in error. The court say there: "The true value of anything is what it is worth when applied to its natural and legitimate uses—its best and most valuable uses. The estimate should have been of its value generally for any and all uses, and not for any particular, ¹³⁷ and especially not for any inferior or inappropriate use." Thus stated, we see no divergence from the rule as stated by Mr. Lewis.

Plaintiff in error also relies on a statement taken from the text of Mills on Eminent Domain, page 168, to the effect that "the owner has a right to its [property's] value for the use for which it would bring the most in the market." While this is embodied in the text, yet it is taken literally from the opinion in King v. Minneapolis Co., 32 Minn. 224, the case which the author cites in support.

In that case, the property sought for condemnation had upon it a manufacturing establishment which was in operation, and the error alleged was that the trial court had improperly let in evidence of that fact. The court held that this was not error, and say that the owner "is entitled to the value of his property for any use to which it may be applied and for which it would ordinarily sell in the market. It is, we think, equally true that any evidence is competent and any fact is proper to be considered which legitimately bears upon the question of the marketable value of the property. In this case, evidence was introduced tending to prove that the fact of a business having been established and carried on on the premises for so long a time, materially increased the market value of the property." It is in this connection the sentence already quoted occurred, and the court further along, as well as in the paragraph just given, show clearly ¹³⁸ that their only meaning in the use of this sentence is that evidence of this special valuable use is competent to go to the jury, in order to enable them to estimate the fair market value of the property. This case is clearly in line with the rule as heretofore taken from Lewis on Eminent Domain.

We have devoted this much time to the examination of the authorities relied on by the counsel for the plaintiff in error,

out of deference for the ability and earnestness with which they have been pressed upon us, notwithstanding the fact that the rule has been established in this state against the contention of plaintiff in error, at least since the case of Woodfolk v. Nashville etc. R. R. Co., 2 Swan, 437, and was reannounced in Alloway v. Nashville, 88 Tenn. 510, in which latter case, in adopting the language of the trial judge in his instruction to the jury, it was said by the court that, in cases like the present, "the cash market value of the land" is the measure of compensation.

In addition to the constraining authority of stare decisis, the rule commends itself as an eminently just one; and, as the trial judge gave the plaintiff in error the full benefit of it in the admission of testimony and in his charge to the jury, the assignment of error on this point is overruled.

In the progress of the trial of the case, evidence was permitted to go to the jury that tended to show that gambling was frequently, if not habitually, carried on in one or more of the rooms of ¹³⁹ the property, and that this fact inflated the rental value of the property. In regard to this, the trial judge said to the jury if they found that gaming was carried on there, and that it did inflate the rental value, then, to the extent of such inflation, the rent received cannot be considered as indicating either the rental or the market value. We think there is no error in this. Gambling is an offense against the law, and the use of any portion of this property for gambling purposes was in violation of the law. And if it was true that such illegitimate use did inflate the rental value of this property, then the jury were properly told that a rent inflated by this use, to the extent of the inflation, could not be taken into consideration as constituting a part of the rental value. It is true that it might be a matter of difficulty to determine where the rental value from a legitimate use ended and that from the illegitimate use began, yet that is the misfortune of the owner, for which the city is not responsible.

In this case, however, we think that there is sufficient evidence to guide the jury, at least approximately, in determining the value of this inflation. It is true it is found largely in the opinion of witnesses, which is necessarily somewhat speculative, but not more so than is ordinarily found as to questions of value.

We are satisfied, in examining this record, that, taking into consideration all the elements that make ¹⁴⁰ up market value—the eligibility of the location of the lot; its front and depth, its rental income, and especially the old and dilapidated condition

of the house on the lot—that the jury fixed a valuation of this property which affords just compensation to the plaintiff in error.

The judgment is affirmed.

EMINENT DOMAIN.—COMPENSATION for property sought to be taken under authority of eminent domain should be determined by the value of such property for the most advantageous use to which it may be applied: *Northern Pac. etc. Ry. Co. v. Forbis*, 15 Mont. 452, 48 Am. St. Rep. 692, and note. Compare note to *Rumsey v. New York etc. Ry. Co.*, 28 Am. St. Rep. 608, and cases therein cited. On the general question, see the monographic note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 113-121.

COOPER v. OVERTON.

[102 TENNESSEE, 211.]

NEGLIGENCE—DANGEROUS PREMISES—LIABILITY OF OWNER TO TRESPASSERS.—The owner of an unfenced, vacant city lot, upon which is situated a pond of surface water caused by the obstruction of a natural drain by city authorities, unknown to such owner, is not required to fence it or otherwise insure the safety of trespassers, old or young, who may go upon the premises, not by his invitation express or implied, but for purposes of amusement or from motives of curiosity. In such case, the owner is not liable for the death of a child ten years old who is drowned while playing on the pond.

NEGLIGENCE—DANGEROUS PREMISES—LIABILITY TO TRESPASSERS—CHILDREN.—Liability of the owner of dangerous premises to trespassers does not exist, even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed upon it by the owner, or with his knowledge permitted to remain there.

EVIDENCE.—OPINIONS OF WITNESSES as to what will attract children to a pond of water, or as to whether children like to ride on a plank in the water, are incompetent and inadmissible as evidence.

Gillham & Gillham, for the appellant.

Turley & Wright, for the appellees.

212 WILKES, J. This is an action for damages for the drowning of Oscar Cooper, the son of plaintiff, William H. Cooper, the father being the administrator of the son. It is conceded that there is no cause of action against John Overton, trustee, and as to him the action is dismissed. There was a verdict and judgment for defendant, and an appeal by plaintiff, as administrator, and he has assigned errors.

The facts, so far as necessary to be stated, are that Oscar Cooper, a boy about ten years of age, was drowned by falling from a plank upon which he was attempting to float upon a pond of water upon a lot owned by defendant, Jesse M. Overton, in Memphis, Tennessee. Overton is a resident of Nashville, Tennessee, and is the owner and in possession of lots Nos. 48 to 53 of block 24, in the tenth ward of Memphis. These lots front about one hundred and forty-eight and one-half feet on the east line, and about four hundred feet on the north line of Clay street. They had descended to him from his grandfather. They were unimproved, unfenced, and uninclosed. The property had no other than natural drainage. The lot adjoining these lots is separated from them by a fence, and on it there is a house, about one hundred and fifty feet from the line of the lots. There are no other houses in the immediate vicinity of these lots, but they are located within a few blocks of a somewhat thickly populated part of the ²¹³ city. About four hundred and fifty feet northwest of these lots is a public school building, usually attended by about three hundred and seventy pupils, and there is a Catholic parish school a few blocks south. This property was looked after by Overton & Overton, real estate agents, for the owner, Jesse M., who rarely visited Memphis. Surface water from contiguous property flowed across these lots, and gradually cut a gully of several feet deep, through which it found vent. The city, it appears, without the knowledge of the owner or his agent, filled up the lower end of this drain by dumping trash and dirt into it, so as to form a dam and cause a pond of water to form or accumulate on the lot. The edge of this pond was about fifty feet from a sidewalk on Lee street, and one hundred and fifty feet from the sidewalk on Clay street. It appears from the statements in the record that Overton & Overton, agents, were in the habit of inspecting the premises about twice a month, and when last inspected there was no pond upon them, and it is further stated that they had no knowledge there was a pond upon the lot until after the drowning, which occurred January 10, 1899.

It further appears that the pond would form after a heavy rain, and in a short time would dry up and disappear, and at this time there had been a heavy rain for two days. When notified of the accident, Mr. Overton went to the city authorities and complained of their action in stopping the drain, and the city at once removed the dam and filled ²¹⁴ up the pond. On both sides of this property defendant, Overton, had caused

sidewalks to be laid, and the pond was about fifty feet from the nearest point of the sidewalk. There appears also to have been a path or walkway across the lot, which was used by a few persons as a cut-off instead of going around the sidewalks, but the public was not in the habit of using it. Its nearest point to the pond was about twenty-five feet. It does not appear that the owner or his agent had ever given any permission to the public to use a pathway across their lots or that they knew of such use.

The deceased was a pupil in the public school, and is shown to have been a boy of average intelligence. It appears that the school children had been playing in a bayou which crossed these lots. They had been forbidden (and the intestate with the others) from going on these lots by the principal, and, as a rule, these instructions had been obeyed. The deceased, however, with another boy, John Appling, aged about eleven years, and a younger brother of the latter, went over this lot from the sidewalk, about fifty feet to the edge of the pond. A piece of the plank sidewalk had been torn up and thrown on the water of the pond, by whom does not appear, and appears to have been the only one on the surface of the water. Oscar Cooper got upon this plank and attempted to propel it around the pond over the water with a stick. He lost his balance and fell off the plank into deep ²¹⁵ water and was drowned. It appears that the two Appling boys declined to get on the plank (deeming it dangerous), though invited to do so by young Cooper. It appears that other children had been playing at or in this pond, sometimes bathing and swimming, but whether school children or not does not appear. It is not shown that the pond had any special attraction for boys, but some testimony tending in that direction was excluded, and forms the basis of a part of the assignments.

There was no danger to anyone on or using the sidewalks. There is testimony tending to show that there was no pond there in the summer, and that it was only formed by heavy rainfalls and would soon dry up. When the pond was full it would extend up to and under the sidewalk of Clay street, but was shallow at that point and generally around the margin of the pond.

Various assignments of error are made, principally to the failure of the trial judge to give certain requests asked by plaintiff's counsel and to the charge as given by him. The first and second assignments will be treated together, and are refusals to charge as follows:

"1. The court instructs you that it is the duty of all owners of property situated in the city, or where many people live or travel, to take such reasonable care of the same as will render it reasonably safe to the public.

"2. It is the duty of all such property owners ²¹⁶ to abate any dangerous nuisance which may arise on their premises, and it is his duty to look after his property, and, if a nuisance has existed for a considerable time, he is in law presumed to know it, and then it becomes his duty to abate it."

Without stopping to comment on these requests, which we think are too general and meager in terms, we think the trial judge in his general charge more correctly stated the law applicable to the facts of this case and in much better language, as follows: "An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal right. This necessarily carries you to determining what Oscar Cooper's legal rights were. He had a legal right to pass over and along either Clay or Lea street in safety. These were the streets that bounded the lots upon which it is claimed the pond was. Defendant, Overton, had no right to construct, maintain, or permit a pond upon his lots so near to the streets which bounded the lots as to make it dangerous to persons who were using the streets. So, if you find from the evidence that the pond was so near to the streets which bounded the lots as to endanger anyone who was using the streets, and, as a consequence thereof, Oscar Cooper was drowned, then the plaintiff can recover."

The third assignment is that the trial judge refused to charge a request, as follows: "If a pond should form upon the vacant property of the owner, situated in the populous districts of a city, and near ²¹⁷ streets or public schools where many children attend, and which pond is deep enough to drown a child, it is the duty of the owner to abate the nuisance, to drain or fill up the pond." This assignment will be considered with the fourth and fifth, which raise the question of the correctness of the trial judge's charge, as a whole, upon the duties of the landowner and the rights of the public.

The judge charged as follows: "The pleading of defendant, Overton, puts upon plaintiff, Cooper, the burden of making out his case upon every material point by a preponderance of the evidence. The material points upon which the evidence must preponderate before it authorizes the jury to give plaintiff a verdict are the following: 1. He must establish the fact that a pond

was maintained or permitted to exist upon defendant's lots; 2. That the manner or condition in which it was maintained or permitted to exist was negligence in itself; 3. That it was because of its condition, or the negligent manner in which it was maintained or permitted, that Oscar Cooper was attracted to it and was drowned. Unless these three points are established by a preponderance of the evidence there can be no recovery. An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. This necessarily carries you to determining what Oscar Cooper's legal rights were. He had a legal right to pass over and along either Lea or Clay streets in safety. ²¹⁸ These were the streets that bounded the lots upon which it is claimed the pond was. Defendant, Overton, had no right to construct, maintain, or permit a pond upon his lots so near to the streets which bounded the lots as to make it dangerous to persons who were using the streets. So that, if you find from the evidence that the pond was so near to the street that it endangered anyone who might be using the street, and, as a consequence thereof, Oscar Cooper was drowned, the plaintiff can recover. On the other hand, if you find from the evidence that Oscar Cooper had to leave the sidewalk and go over on the private property of Overton, thirty feet or more, before he came to a place of danger in the pond, then there can be no recovery in this case from the bare fact of maintaining or permitting a pond to remain on the lot, for the reason that every owner of real estate has the right to use his property just as he pleases, so long as the use which he makes of it does not endanger anyone else in the enjoyment of their legal rights; and if any owner of real estate has a right to use his property just as he pleases, you can see that such owner has the right, if he so desires, to dig a pond on his lot. The only restriction which the law imposes upon this right is this, that the owner, in digging the pond, must see to it that he does not put it near enough to an adjoining lotowner to endanger the use of his property, and that he does not dig it near enough to a public street to ²¹⁹ make it dangerous to persons using the street. When the lotowner has observed these precautions in digging or maintaining a pond on his lot, he has complied with the law, and no one can legally complain; if he has not observed the precautions just mentioned, and injury results to anyone as a consequence of the owner's failing to observe them, the injured person can recover."

It will be noted that neither in the charge nor the requests is the idea prominently presented that this pond was or might be a place attractive to children, but the requests are based upon the idea that there is an obligation resting on the landowner to keep his premises near a public school or highway free from dangers which arise from natural or artificial causes. This feature of attractiveness of the pond was made prominent in the declaration, and some proof was attempted to be introduced upon it, but was rejected so far as based on opinion. It is, however, pressed in argument, and will be considered along with the other features of the case.

As to this feature of attractiveness, the record presents the following state of facts: Miss Conway, the principal of the school, testifies that some boys had been reported to her as having skated on ice over Overton's lots, and she had forbidden the little boys from going to the bayou to play, because they would get their feet muddy. She had never known that the children of the school had been in the habit of playing on it.

²²⁰ Wall, the janitor, says he has seen children come into school and had to strip them; but they had fallen in and come out, but that he did not know of any of the school children playing there except from hearsay; that he had to run some children out who were swimming there, but not at the time of the year (February) when this drowning occurred. He had seen some children playing on some planks in the pond, but when this was is not stated. His evidence is largely, if not altogether, hearsay, and is not at all definite.

The case has been very elaborately and ably argued by learned counsel, and we have been furnished with exhaustive printed briefs on each side, and very full citation of authorities. The plaintiff insists that the merits of the controversy are embodied in his third request, and he specially relies upon several cases which we will notice.

The first is the case of *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114. In that case the court says: "There is a conflict in the decisions upon this subject, some courts holding in favor of the liability of the owner, and others ruling against it." It then proceeds to lay down the rule as follows: "When the land of a private owner is in a thickly settled portion of the city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery or a dangerous pit or pond of water, or any other dangerous ²²¹ agency, at a point thereon near such public street or alley, of such a character as

to be attractive to children of tender years incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon such premises, even though they may be technical trespassers."

And, again, the case quotes with approval the statement made in *Shearman and Redfield on Negligence*, as follows: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition, for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees": Citing 2 *Shearman and Redfield on Negligence*, 4th ed., sec. 705; 4 *Am. & Eng. Ency. of Law*, 53, and notes. In such case the owner would reasonably anticipate the injury which had happened: 1 *Thompson on Negligence*, 304.

In the *Pekin* case there was a pond or pit of water, five to fourteen feet deep, in a populous city, on lots belonging to the city and filled with logs and timber floating therein, on which children were in the habit of playing, near a driveway across vacant lots, but partially inclosed, and the city had been notified that it was dangerous, and requested to remove it, ²²² but had allowed it to remain a year until a boy eight and one-half years of age went through an opening on the causeway, stepped on a log in the water, which rolled and threw him into the water.

The case of *Price v. Atchison Water Co.*, 58 Kan. 551, 62 Am. St. Rep. 625, is also relied on by plaintiff. In that case a landlord maintained on his premises a reservoir filled with water, to which children were attracted for fishing and other sports, which was well known to the landlord, and who took no means to warn them or exclude them, and a child eleven years of age was attracted to the place and fell in and was drowned, and it was held the landlord was liable. The case turned upon the allurements and enticement held out to children, and the knowledge of the owner of its danger, and that children did frequent it habitually. To the same effect are cited *Brinkly Car Co. v. Cooper*, 60 Ark. 545, 46 Am. St. Rep. 216, and a number of other cases, more or less in point, and holding the same general doctrine.

On the other hand, counsel for defendants call the attention of the court to a number of well-considered cases, more or less

in conflict with the cases cited for plaintiff, only a few of which we refer to as illustrating defendants' contention.

The case of *Richards v. Connell*, 45 Neb. 467, is where a demurrer was sustained to a petition which set out facts almost identical with the facts in the present case. The statements in the petition ²²³ were that "on the twenty-ninth day of June, 1891, and for a long time prior thereto, the defendant was the owner of lots 40 and 41 in the city of Omaha, and the plaintiff's father was, during said time, the owner of the adjoining premises, described as lot 59; that defendants had, for a long time prior to the date named, negligently permitted the surface water to accumulate on said lots, thereby creating a deep and dangerous pond; that they had failed and neglected to fence said lot, or to erect barriers of any kind to prevent children, lawfully in the vicinity thereof, from falling into said pond; that said lots are situated in the vicinity of one of the public schools of said city, and the pond is not only dangerous to persons passing along South street adjacent thereto, but is situated in a public and much frequented place, and attractive to children of tender age, many of whom are accustomed to play about and upon the water; that on June 29, 1891, plaintiff's intestate, a boy ten years of age, yielding to the natural impulses of childhood, went on said pond upon a section of wooden sidewalk floating thereon, from which he fell into said pond and was drowned."

The court, in passing on the demurrer, said: "The petition, we think, fails to state a cause of action against the defendant; the demurrer was, therefore, rightly sustained. The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water ²²⁴ or dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, expressed or implied, but for purposes of amusement or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such duty exists."

The case of *Klix v. Nieman*, 68 Wis. 273, 60 Am. Rep. 854, is very similar to the one at bar. That case was also decided on demurrer, and the court said: "We think the demurrer in this case was properly sustained, for the reason that the complaint shows no actionable negligence on the part of the defendant. The complainant states that the defendant was the owner of and in the possession of a lot in the city of Milwaukee, situated on

the northeast corner of Hubbard and Loyd streets; that the lot was in a thickly populated part of the city, and was not inclosed by a fence between it and Hubbard street or on the side between it and Loyd street, but that the lot was vacant and open, so that the public had free and unrestricted access thereto from both Hubbard and Loyd streets; that for a long time prior to September 5, 1885, there had been upon the lot a deep and dangerous hole or excavation, partially filled with water, making a pond which covered about the entire surface; that the water of the pond was oily, so that its depth could not be ascertained only by measurement, but that in places it was of the depth ²²⁵ of nine feet, so that the pond was dangerous to the lives of children who might be attracted thereto for amusement or otherwise; that the defendant, well knowing the pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently, and carelessly permitted it to remain unguarded by fence or barricade, and the plaintiff's son, a lad of nine years of age, while playing upon or about said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said pond, fell, or was precipitated, into the same, and was drowned. It will be observed," says the court, "that it was not alleged that the pond was so near the highway as to make it unsafe for persons going along the street or sidewalk, and no averment that the boy, when he fell into the pond, was passing along the street or sidewalk. On the contrary, it is stated that the boy was playing upon and around the pond when he was precipitated into the water and drowned. So, the single question presented is, Was it the duty of the defendant to fence or guard this hole or excavation on his lot, which it does not appear he made or caused to be made, where surface water collected, in order to secure the safety of strangers, young or old, who might go upon it or about the pond for play or curiosity? If the defendant was bound to fence or guard the pond, upon what principle or ground does this obligation exist? There can be no liability unless it was his duty to fence ²²⁶ the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of persons going upon his land who have no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold. A learned authority states the doctrine in these words: 'An owner of land is under no obligation to fence an excavation on his land unless it is so near the highway as to amount to a public

nuisance, and if persons or animals are killed or injured in consequence of his failure to do so, no damages can be recovered.'

"The qualification of this rule is that when the owner of land, expressly or by implication, invites a person to come upon it, he will be liable for damages if he permit anything in the nature of a snare to exist thereon which results in injury to such person, the latter being at the time in the exercise of ordinary care. If, however, he gives a bare license or permission to cross his premises, the licensee takes the risk of accident in using the premises in the condition in which they are. Quoting from 1 Thompson on Negligence, 361: 'Among other authorities cited by the administrator to sustain this doctrine is *Harcastle v. Railroad Co.*, 4 Hurl. & N. 67, where Pollock, C. B., uses this language: 'When an excavation is made adjoining a public highway, so that a person walking upon it might, by making a false step, or being affected ²²⁷ with sudden giddiness, or in the case of a horse or carriage that might, by a sudden starting of the horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the highway, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different. We do not see where the liability is to stop. A man getting off the road on a dark night and losing his way may wander to any extent. And if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not.'"

In *Shearman and Redfield on Negligence*, fifth edition, section 705, it is said: "The owner of land where children are allowed or accustomed to play must use ordinary care to keep it in a safe condition. And yet, merely allowing children to play upon a vacant lot is held not to amount to an invitation which creates liability for its condition": Citing a large number of cases, and among them *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543. In the syllabus of this case this language is used: "The owner of a lot in a city who failed to fence the same is not liable in damages for the death of a boy who entered upon the premises without invitation or permission, and was drowned while bathing in a pond on the lot." There was a judgment in favor of the defendant in this case, just as in the case ²²⁸ at bar, and the same argument was made by counsel for appellants in that case as is made here. Thus, on page 642 we find appellant's counsel making this conten-

tion: 1. The owner of the property having thereon any dangerous agency which is attractive to children, or where he has knowledge that they resort to it for amusement or otherwise, and fails to use ordinary care, under the circumstances, to guard the same against injury, must respond in damages for such neglect, irrespective of the fact that the danger is not adjacent to the highway: Quoting *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114; *Mackey v. Vicksburg*, 64 Miss. 777; also *Branson v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, and a long list of authorities cited by opposing counsel in case at bar.

The opinion in the late Missouri case, however, after stating the facts, which are much more favorable to the plaintiff than the facts in the case at bar, since the pond is shown to have been only twenty feet away from a public street and in a populous part of the city, uses this language: "The views expressed in *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, are applicable to the case at bar, and are not rendered inapplicable by the fact that the child entered on the premises where he was drowned through adjoining private property. The same principle applies, whether the unauthorized entry be made on private grounds, as where a public street is used for the like purpose." *Overholt's* case has been recently and approvingly cited and followed in the quite recent cases of *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, and *Barney v. Hannibal etc. R. R. Co.*, 220 126 Mo. 372. Having fully discussed in these cases the subject here involved, it is needless to go over the same ground again. Abundant authorities, in addition to those just mentioned, have been collected by the industry of counsel, which as fully maintain these views as those already mentioned.

The case of *Richards v. Connell*, 45 Neb. 467, was decided last year by the supreme court of Nebraska. The facts in that case are almost identical with those in this case. The action there, as here, was against the city of Omaha and the owners of certain uninclosed lots of ground. The petition there alleged that defendants had, for a long time prior to the death by drowning of a boy of about ten years of age, permitted the surface water to accumulate on the lots, thereby creating a deep and dangerous pond, and that defendants had failed and neglected to fence the lots or erect any barrier to prevent children, lawfully in the vicinity, from falling into the pond; that the lots were in the vicinity of a public school, and adjacent to a street, and in a place much frequented and attractive to children of tender years, who were accustomed to play about and upon the water.

The boy was playing upon a raft floating upon the water, and fell in and was drowned. The case also approvingly cites and follows the Overholt case, and distinguishes the facts treated in that case from what is commonly known as the turntable cases. To the like effect see *Ratte* ²³⁰ v. Dawson, 50 Minn. 450; *Charlebois v. Gogebic etc. R. R. Co.*, 91 Mich. 59; *Murphy v. Brooklyn*, 118 N. Y. 575; *Clark v. Manchester*, 62 N. H. 577; *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 10 Am. St. Rep. 396; *O'Connor v. Illinois Cent. R. R. Co.*, 44 La. Ann. 339; *Benson v. Baltimore Traction Co.*, 77 Md. 535, 39 Am. St. Rep. 436; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, and other cases.

The case of *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, holds as follows: "The owner of a building in process of construction in a city is not liable for injuries to a child playing thereat without his knowledge, and without any inducement or invitation, implied or otherwise, on his part to a child to go upon the premises. Plaintiff's son, seven years of age, went to one of the cellar windows of a building in process of construction in the city of St. Louis, which was about three feet from the street line, and sought to draw himself up by taking hold of a stone placed across the top of the window frame. The stone was not fastened, and fell and killed him. It did not appear that the owner of the building, a contractor, knew of the dangerous position of the stone, or that children were in the habit of playing around the building. Held, that deceased was a trespasser, and that no inducement or invitation, implied or otherwise, having been held out to him to enter upon the premises, there could be no recovery for his death."

In the case of *Murphy v. Brooklyn*, 118 N. Y. 575, this language is used: "This action was brought to recover damages for the death of ²³¹ plaintiff's intestate, a boy six years old, who was found drowned in a hole alongside a sewer constructed by defendant through private property and then into the street, with the consent of the owner. It appeared that the sewer emptied into the bay. At high tide the sewerage was driven back up the sewer, causing the cavity in question. This was about fifty feet from one of defendant's streets, along which, forming the boundary of the adjoining premises, was an embankment faced by a wall, and on the top of this a fence or railing of posts and crossbars. At a point where it was supposed the plaintiff's intestate went upon the premises a crossbar was down—the wall had given way. People going to the bay had occasionally crossed there, and the ground for ten or twelve feet from

the fence had the appearance of a path. It did not appear that any objection had been made by any person to the construction and maintenance of the sewer. Held, that no violation of any duty which the defendant owed to the deceased had been shown, and so it was not liable. The construction of the sewer was not wrongful, nor was its maintenance a nuisance; the defendant owed to him no duty of care to protect him while upon the premises, or to guard the hole, as it was not so close to the street as to make the latter unsafe; it seems that the owner of the premises could not have been charged with negligence in permitting the hole to remain: Distinguishing *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; quoting ²³² with approval *Hargreaves v. Deacon*, 25 Mich. 1, *Blythe v. Topham*, Cro. Jac. 158, *Hardcastle v. Railroad Co.*, 4 Hurl. & N. 67, and many other authorities."

In the case of *Hargreaves v. Deacon*, 25 Mich. 1, the rule is laid down as follows: "Owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, when the person injured was not on the premises by permission or on business or other lawful occasion, and had no right to be there. Where an injury arises to a person from the neglect of one doing his lawful business in a lawful way, to provide against accident, the question arises at once whether he was under any obligation to look out for the protection of that particular person under the particular circumstances of the case, for the law does not require vigilance in all cases, or in behalf of all persons. If on the sidewalk, the duty of protection extends to all persons who have a legal right to go there; or, in other words, to the whole public, and it depends upon that right. On private property, not open of right to the public, it applies less generally, and only to those who have a legal right to go there and claim the care of the occupant for their security while on the premises against negligence, or to those who are directly injured by some positive act involving more than passive negligence. We have found no cases which hold that an accident from negligence on private premises can be made a ground of damages, unless the party injured ²³³ had been induced to come by invitation, or by employment which brings them there, or by resorting there as to a place of business, or a general resort held out as open to customers or others, when lawful occasion may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely from motives of convenience in no way connected with business or other relations with the occupant." In that case a little child

of tender years had strayed upon the property of defendants, and had fallen into a pond which was open and unguarded.

In *Ratte v. Dawson*, 50 Minn. 450, this language is used: "Where a child of tender years was taken by an older sister, to whose care it was intrusted, to a vacant lot in a city for recreation and pleasure, and was accidentally knocked down and killed by the caving in of an embankment caused by excavations for sand, and which had been left unfenced, it was held that the landowner was not liable in damages, and that he owed no duty to persons coming upon the premises without his invitation to protect them from danger from excavations therein." The court uses this language: "There is nothing to take the case out of the general rule that where the owner of land, in the exercise of his lawful dominion over it, makes an excavation therein so far from the street that a person coming on to the land without his invitation, and falling into it, would be a trespasser ²³⁴ before reaching it, such owner is not liable in an action for injuries sustained. There was nothing in the nature of the excavation, or anything kept or used there, which can be said to have been specially inviting or attractive to children, or calculated to entrap them into danger, so as to bring the case under the rule established in the turntable cases. The maxim, 'Sic utere tuo,' has no application to such a case; it refers to acts the effect of which extend beyond the limits of the property, and to neighbors who do not interfere with or enter upon it. If the rule were otherwise, the landowner could not sink a well, or dig a ditch, or open a stone quarry on his land, except at risk of being made liable for the consequential damages, which would unreasonably restrict its enjoyment."

In *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, we have a case very similar to the one at bar: "Plaintiff brought an action for damages for the death of his infant son drowned in a pond of water upon a lot owned by the defendant. The water used to run over the lot until the street was graded by the city of San Francisco on the side toward which the land sloped, since which time the water accumulated in the rainy seasons, forming a pond which disappeared during the dry season. The boy was drowned while playing on a raft that was floating in the pond, and was eleven years of age. The general rule is, that the owner of land is under no obligation to keep his premises ²³⁵ safe for trespassers, whether children or adults, and governs this case."

The rule of turntable cases is not applicable. That rule is approved in that state (see *Barrett v. Southern Pac. Co.*, 91 Cal.

296, 25 Am. St. Rep. 186), but should not be carried beyond the class of cases to which it has been applied. It has been repeatedly held that damages cannot be recovered for the death of a child drowned in a pond on private premises who had gone there without invitation: Quoting *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557; *Hargreaves v. Deacon*, 25 Mich. 1; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Richards v. Connell*, 45 Neb. 467.

In response to a petition to rehear, the court entered very fully into the distinction between the case and the turntable cases, and showed to what absurdities the doctrine that the landowner is liable for injuries to children who are attracted onto his premises, by instancing the case of the death of a child who, attracted by the tempting fruit, climbs into a tree and falls and is killed.

The court says: "With respect to danger especially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different from where the danger exists naturally and arises from natural causes. It distinguishes the Illinois case of *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, by showing that it was one where the city had made the dangerous excavation in a thickly peopled quarter, ²³⁶ while in the case under consideration the pond on the owner's land [as in this case] was created by the city without any fault on his part [and in this case without defendant's knowledge]."

There is a late case decided by the supreme court of Minnesota, in July, 1898, which is directly in point. This is the case of *Dehanitz v. St. Paul*, 73 Minn. 385. The syllabus is as follows: "Within the limits of the city of St. Paul, and between the banks of the Mississippi, is a slough more than a quarter of a mile in length, which, during high water, fills with water, and has no outlet. In this slough is an open basin from sixty to seventy feet across, which is contiguous to James street. For a long time the city of St. Paul has used this hollow basin as a place for dumping garbage, and during high water it floats upon the water, and forms a crust, upon which grows vegetation similar to that upon the surrounding land. The plaintiff's intestate, a girl ten years old, left James street, upon which she had been traveling, and, either for convenience or pleasure, attempted to cross over this crust. From the facts, it did not appear that the public had ever trav-

eled over this dumping ground or used it as an open common. Held, that the city owed no duty of protection or warning to those going over this dumping ground or crust, and hence was not liable for her death."

The opinion in this case concludes as follows: ²³⁷ "However sad may be the untimely death of this young girl, yet, under the facts and well-settled rules of law, the order denying the defendant's motion for a new trial must be overruled. We have not deemed it necessary to discuss the authorities cited by either counsel, as the facts clearly demand a reversal of the order. It is sufficient to say that the rule laid down in the well-known turntable cases has no application to the case at bar."

It will be seen that the authorities cited are in direct conflict upon what may be said to be the real issue in this case, but we hold, upon reason and weight of authority, that liability does not exist even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed upon it by the owner, or, with his knowledge, permitted to remain there, and this is the doctrine of the turntable cases. Further than this the facts in this case do not warrant us in going.

In the case at bar, the proof wholly fails to show that the owner of this property caused the water to stand upon this lot in a pond, but this was done by the city. It wholly fails to show that the owner, or his agents, did anything to render the pond attractive, or that they placed any planks upon it, and the proof does show affirmatively that the owner did not know of the existence of the pond, or its dangerous character, and that he also, through his agents, looked after the property with as much diligence as should be required. It is impossible, therefore, ²³⁸ upon any theory of the case, to find a ground of liability of the defendant. The leading cases relied on by plaintiff, cited above, have, as an important and essential feature fixing liability, the creation of the danger or actual knowledge of it by the owner, neither of which features exist in this case.

In *Clapp v. La Grill* (Tenn., Apr. 12, 1899), it was held that if the premises were rendered dangerous by the acts of a third person, and the owner had no knowledge of it and could not have known it by proper diligence, the owner would not be liable for injuries from the defects.

We have treated the case as though the special requests were made as the rule requires, but the record shows they were made before the main charge was delivered, and hence, under our rule, they could not be held as properly made. Still, the entire

question is raised by objection to the charge as given, and we have used the requests the more plainly to define the plaintiff's contention.

There are various errors assigned in the record, but not argued before the court, which we dispose of briefly. The testimony of Miss Conway was objected to so far as it sought to have her state the age of the children in school under her charge. The exception to this testimony is not properly made. The record fails to show how much of her examination, made in the absence of the jury, was read to them after they returned, and it fails to show that any exception was taken to the action of the trial ²³⁹ judge upon the final disposition of this matter, and as to this feature the record is confused. In the view we have taken of the case, the evidence is immaterial.

It was not error to exclude the testimony of the same witness as to her opinion of what attracted the children to the water, nor John Appling's opinion as to whether boys like to ride on a plank in the water. The court rejected the testimony because it called for opinions merely, and there was no exception to the ruling, and what the answer would have been does not appear. Mr. Wall was asked if he found in his experience that this pond, with planks in it, was an attractive place for children. This was objected to by counsel for defendant, and there was no answer nor ruling by the court. It was, moreover, but an expression of opinion. As to the eleventh assignment, it called for a statement which the witness showed could only be given from hearsay, and it was properly excluded.

It is said the court excluded all the evidence tending to show that the pond was attractive to children. This is too general. It does not point out specific questions asked and answers given, and does not attempt to do so. We have already referred to several questions, and the action of the court thereon, bearing upon the question generally, but we cannot, on this general objection, look through the record to find what is referred to. But upon an examination of the whole record, we are satisfied ²⁴⁰ that nothing material to the real issue in the case was excluded. The ground of liability, if any existed at all, was that the pond was an attractive place for children. Witnesses were not allowed to give their opinions as to this feature, but they were allowed to state the situation of the pond, its size, character, and appearance, and what was on it to make it attractive and different from any other sheet or collection of water, and any facts from which the jury might have inferred and concluded

that it was or was not attractive. The court did not specifically charge, upon this feature, whether the pond was attractive or not, and was not asked to do so, probably because the proof did not call for it, as the only evidence of attractiveness was that a plank was floating on the surface of the water; but how long it had been there, or by whom it was placed there, did not appear, and it was affirmatively shown that the defendant had no knowledge of the plank or the pond itself.

We find no reversible error in the record, and the judgment of the court below is affirmed with costs.

TRESPASSERS, LANDOWNER'S LIABILITY TO.—The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers or those who may go upon them, uninvited, from curiosity or private convenience in no way connected with the owner: *Railway Co. v. Ferguson*, 57 Ark. 16, 38 Am. St. Rep. 217, and note; *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114.

TRESPASSING CHILDREN — LANDOWNER'S LIABILITY FOR PONDS.—If a pond of water exists on premises adjacent to a public highway, or is created there by the action of a municipality in grading a street, the landowner is not answerable for the death of a child who goes to such pond without invitation, and is drowned therein: *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, and note.

A WITNESS MAY NOT GIVE AN OPINION when testifying merely as to matters with which the jury are supposed to be equally conversant with himself and equally capable of drawing as correct a conclusion: *Hurt v. St. Louis etc. Ry. Co.*, 94 Mo. 255, 4 Am. St. Rep. 374. Testimony of witnesses which is a mere matter of opinion is inadmissible as evidence: *Otis v. Thom*, 23 Ala. 469, 58 Am. Dec. 303, and note.

SLACK v. SUDDOTH.

[102 TENNESSEE, 375.]

PARTNERSHIP—FORCED SALE OF GOODWILL OF BUSINESS.—No forced sale or transfer can be made of the goodwill of the business in a suit to wind up a partnership, when such goodwill is based upon professional reputation and standing, or upon business connections. Such goodwill can be the subject of a voluntary sale or contract alone.

L. and E. Lehman, for the appellant.

Smith & Trezevant, for the appellee.

375 WILKES, J. Drs. Slack and Suddoth were partners in the practice of dentistry in the city of Memphis for a number of years. They occupied two offices on the second floor of No. 243

Main street, which they rented or leased year by year. They were equally interested in the business and property of the firm, and the partnership was unlimited ³⁷⁶ as to duration. The subject of dissolution was discussed between them for several months, but no satisfactory conclusion was reached until, on April 30, 1894, complainant notified defendant that the partnership was dissolved. Before doing so, however, or on the day after, he rented another office in the same building and near the head of the stairway, and on the next day after the dissolution he advertised in the daily paper that the partnership was dissolved and he was located for practice in an adjoining room in the same building, and he put his sign up at his office door. Attempts were made between the parties to settle up their business, but they were unsuccessful. Suddoth remained in charge of the old offices and used such of the furniture and instruments as he needed or wished. Slack then filed a bill to wind up the partnership, and he asked that a receiver be appointed to take charge of the lease and property and sell the same, and that he be allowed to start the biddings for the same at two thousand dollars. The defendant answered. The chancellor appointed a receiver, and directed him to offer the use and rent of the two rooms to both parties for the remainder of the year (about seven months) and to let them go to whichever would indemnify the other against the landlord's rent and give the greatest bonus in addition. He was also to take possession of the personal property and hold it for further orders. Defendant thereupon obtained from one of the judges of this court a fiat superseding ³⁷⁷ the order of the court below to sell the use of the offices. This was dissolved at the April term, 1895, of this court and the cause remanded for further proceedings. In the meantime, the current rent or lease expired, and defendant himself leased the rooms from the landlord and continued in possession. The chancellor ordered a reference upon the several features necessary to settle accounts between the parties, and, among other things, the master was directed to report what leases the partnership had when the suit began and which one of the parties had received the benefit of the same, and how much, if anything, he should pay therefor, and who had paid the landlord's rent, and what damage had accrued to complainant by reason of the supersedeas sued out in this court. The clerk reported the facts as already stated and that defendant should pay to the complainant five hundred dollars for his interest in the lease, upon the ground that it was valuable, and enabled the holder to appear to the

public as the successor of the old and well-established firm and procure a re-lease of the property. This was excepted to and exception overruled by the chancellor, and there was an allowance of five hundred dollars in favor of complainant for his interest in the remainder of the rental or lease contract, reciting that it was the value of the "goodwill" attached to the offices. From this much of the decree the defendant appealed, and this presents the only question before us.

The rental paid the landlord for the rooms under ³⁷⁸ the lease to the firm was forty-nine dollars per month, and after the firm dissolved defendant continued to pay this amount of rental, and after the expiration of that lease he rerented at the same rate. It appears that the complainant also tried to rent the rooms at the same price after the firm lease terminated.

The chancellor, as well as counsel, have treated the item of five hundred dollars as the "goodwill" of the firm. It is difficult to define what "goodwill" is. Lord Eldon said that it was simply "the possibility that the old customers will resort to the old place": *Cruttwell v. Lye*, 17 Ves. 335; *Moreau v. Edwards*, 2 Tenn. Ch. 349. But in *Churton v. Douglas*, 1 John. 174, it was said that this was too narrow a view to take of it, and there it was said that it was every positive advantage acquired, arising out of the business of the old firm, whether connected with the premises where it was carried on, with the name of the late firm, or with any other matter carrying with it the benefit of the business of the old firm. But it is evident that this definition is too narrow when applied to the goodwill of a partnership to practice a profession, since it leaves out of view the advantage to be gained from the professional standing and reputation of the partners themselves, which constitutes the principal feature of value in such partnerships. Accordingly, it is insisted that there is no such thing as "goodwill" attaching to professional partnerships. Certainly, there can be no forced sale or transfer in invitum ³⁷⁹ of such goodwill so far as it is based upon professional reputation and standing, such as arises from the skill of physicians, dentists, attorneys, etc., whatever may be done as to such goodwill as arises out of location. Still, in the sense in which Lord Eldon uses the term "goodwill" of the premises, there may be an advantage of pecuniary value in occupying premises which have been occupied by skilled professional men, and to which the public has resorted or has been attracted by advertisements, or prior visits or general reputation of prior occupants. Many persons attracted to the place by the

reputation of former occupants might remain no matter who might be in occupancy, and others might leave so soon as it was ascertained they were not occupied by the persons in whom they have professional and personal confidence.

It will be seen from this brief mention what an unreliable, and we might say imaginary, value could be placed upon what is called "goodwill" in this case: *East Tennessee Bank v. First Nat. Bank*, 7 Lea, 420. Certain it is that there was no actual goodwill between these parties after the dissolution. On the contrary, they were hostile in their views.

It was not the case of one professional retiring and recommending his successor to his old customers, which is the principal feature in the sales of goodwill when voluntarily made. But in this instance the defendant was not recommended by complainant. On the contrary, he entered immediately ³⁸⁰ into open and aggressive competition with him. Neither could defendant hope to reap much, if any, advantage from occupying the same quarters, for the complainant, as an active competitor, was hard by in the next room, and as likely to get the old customers, perhaps, as was the defendant. The clerk and master and chancellor evidently fixed the value of this goodwill, as it is termed, from the circumstance that complainant had expressed a willingness to pay defendant five hundred dollars for the use of the offices for the remaining term of seven months unexpired. But it must be evident on the one hand that he might be willing, after having secured his own office adjoining, to pay this sum to have the old offices closed and defendant removed entirely from the premises, and never use the rooms himself, and, on the other hand, defendant did not stand upon an equal footing in bidding for the use of the offices, because if he failed to get them he must go off into some other locality, while, if complainant failed to get them, he had only to step into the next room, and, according to the proof, be as favorably located, if not more so, than in the old offices. The complainant could thus set himself up in the premises of the old firm, and, inasmuch as the defendant had gone out of the building, he might be taken as the successor of the old firm. But defendant could not do this, because complainant was located at his very threshold, to rebut such an inference by the public. We do not think this ³⁸¹ offer was any criterion of value of the use of these rooms. It might more properly be said to be complainant's estimate of benefit to be used for closing them up. But we think the principle back of all is that no forced sale or transfer can be made

of a goodwill when it is based upon professional reputation and standing or upon business connections. "Goodwill" implies something gained by consent, not something realized by force or coercion. We do not mean to hold that "goodwill" has no value and may not be the subject of a voluntary sale. On the contrary, we think it might be sold and is a valid consideration for a contract, and it has been so held in a number of cases: 8 Am. & Eng. Ency. of Law, 1372, note 7.

In *Bunn v. Guy*, 4 East, 190, a contract by a practicing attorney to relinquish his business and recommend his clients to two other attorneys, and that he would not re-enter the practice in certain localities, was held a good contract. So in *Whittaker v. Howe*, 3 Beav. 383. In *Hoyt v. Holly*, 39 Conn. 326, 12 Am. Rep. 290, there was a similar contract made by a physician with a brother physician, and it was sustained. So in the case of *Warfield v. Booth*, 33 Md. 63. In all these cases there was a voluntary sale and an obligation to aid the purchaser or not to enter into competition with him for a certain time or in certain localities. No doubt, in this case complainant could have made a valid agreement with defendant for a consideration to leave the old offices ³⁸² and let him have the advantage of their use, but this was not done.

We are of opinion it was error to allow this item, and it is stricken out. Judgment will be rendered as may be indicated by the result. This may be agreed on, or the clerk of this court, in the absence of such agreement, will report the amount. The appellee will pay costs of appeal. Costs of court below will remain as adjudged by that court.

PARTNERSHIP OF PHYSICIANS—SALE OF GOODWILL. It has been held that, on the death of one of two surgeons who were conducting business as partners, the survivor was not obliged, in the absence of a contract, to give up business and sell the practice, but that he might continue the practice and take the emoluments arising therefrom: Note to *Tardy v. Creasy*, 59 Am. Rep. 689. But a physician may make a voluntary sale of the goodwill of his practice: *Hoyt v. Holly*, 39 Conn. 326, 12 Am. Rep. 390; and an agreement not to practice medicine in a certain place will be enforced by an injunction: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, and note.

MEACHAM v. GALLOWAY.

[102 TENNESSEE, 415.]

INNKEEPERS—LIABILITY FOR BOARDER'S GOODS.

An innkeeper is not liable for the loss, by theft or otherwise, of the baggage or goods of a boarder, unless resulting from the wrongful act of such innkeeper or his servants.

INNKEEPERS—DIFFERENCE BETWEEN GUESTS AND BOARDERS.—A guest at a hotel or boarding-house is one who comes without bargain as to time or price and goes away at pleasure, paying only for the actual entertainment received. A boarder is one who stays for a definite length of time, at a specific price previously agreed upon.

INNKEEPERS—BOARDER, WHO IS.—One who takes rooms in a hotel, in the quarters allotted to regular boarders, for himself, family, and his visitors, for two or three weeks at a special rate, is a boarder and not a guest.

Pierson & Ewing, for the appellant.

Percy & Watkins, for the appellee.

415 McALLISTER, J. This bill was filed in the chancery court of Shelby county against the defendant **416** partnership, carrying on and operating a public inn in the city of Memphis known as the Peabody Hotel, to hold it liable for the value of a sealskin coat and sealskin cape and a valise, alleged to have been stolen from complainants' room while guests at said hotel. The chancellor, upon final hearing, dismissed the bill. Complainants appealed and have assigned errors.

The first assignment is, the court erred in holding that the relation of innkeeper and guest did not exist between complainants and defendants; second, the court erred in holding that, as boarders, the complainants were not entitled to recover.

The facts may be briefly stated. The complainant and his wife, in December, 1897, were boarding in the suburbs of Memphis, and, desiring to entertain a young lady visitor, engaged three rooms at the Peabody Hotel. At the time Mr. and Mrs. Meacham moved to the hotel, he was told the rate would be two dollars per day if they stayed one week. Mr. Meacham stated that his family might stay as long as two or three weeks. As a matter of fact, the family stayed less than two weeks. There is proof tending to show that complainant and his wife were assigned rooms on the fourth floor, among the regular boarders and families of the hotel, and this was done conformably to the request of complainant, and under an agreement to that effect made by him with the hotel clerk. The proof tends to show that

the rate given, two dollars per day for each person, was a ⁴¹⁷ special rate given to all persons who remained longer than a week. Transient guests receiving the same accommodations would have paid higher rates. The proof shows that complainant, his family, and guest occupied three rooms, numbered respectively 139, 140, and 141. Complainant and his wife occupied room 141, while their son occupied room 140, the two rooms being connected by a door. It appears that after complainants had been staying at the hotel about a week, there was stolen from room 141, occupied by complainant and his wife, a seal-skin coat valued at three hundred dollars, a sealskin cape valued at two hundred and fifty dollars, a boy's watch and chain valued at twelve dollars, and a gentleman's valise valued at nine dollars.

The larceny was committed after 2 and before 4 o'clock P. M., on December 1, 1897. Mrs. Meacham testified that she had been wearing the sealskin coat during the morning, returned to the hotel about 12:30 o'clock, removed it, and hung it up in the wardrobe where the cape was hanging. She then locked the door, put the key in her purse, and went down to the parlor to see a lady acquaintance; that in about twenty minutes she returned to her room, prepared for lunch, again locked the door, and did not return to her room until 3:30, when she discovered the larceny. Mrs. Meacham testified that the door was locked and her key to the room was in her purse during the time the larceny was committed; that when she returned to her room and made the discovery the door was still locked.

⁴¹⁸ There is testimony tending to show that room 140 adjoining 141, with a door connecting, was not locked during the time covered by the larceny. The proof shows that, in addition to the key kept by Mrs. Meacham, there was a key to that room in the hands of the chambermaid, one in the hands of the fireman, and another kept at the office, which might be used by a bellboy, under the direction of the clerk, for the delivery of parcels, etc., into the room. Only one of these keys is accounted for on the day of the larceny—that held by the chambermaid, who testified that the key was in her possession, and that she did not enter the room. She testified that room No. 140, the adjoining room occupied by the boy, was not locked about 9:30 o'clock that morning, but that she did not return to it again until after the larceny.

Mrs. Meacham testified that since the larceny the manner of the chambermaid had undergone a marked change; that, while prior to the larceny she was a very attentive servant, afterward

she seemed quite frightened whenever she met Mrs. Meacham or her family.

Mrs. Meacham was asked by her counsel what she thought of the possibility of the garments having been placed in the valise and carried off in that way, to which she replied: "That is my idea; that they did that and walked through. No one could have suspected that it was not the gentleman's who took the valise, if a man had walked through the office with it, and if a man had, in fact, taken it."

⁴¹⁹ It should have been stated that while room 141 was locked, the wardrobe in that room, where the garments hung, was not locked. The door to the room 141 was not broken open, but the door between 140 and 141 was open when the larceny was discovered. The proof fails to show whether the outside, or hall, door to 140 was locked at the time the larceny was committed. The fact that Mrs. Meacham fails to testify on this point makes it inferable that the hall door to 140 was not locked.

It was conceded on the trial that the watch and chain should have been deposited in the safe, in compliance with notices to that effect posted in the room, and that no recovery could be had for the loss of the watch and chain.

The chancellor held that complainant and his wife were boarders at the hotel, and that, as the record did not disclose any culpable negligence, the defendants were not liable for the value of the articles. In support of the decree of the chancellor, it was argued that complainant was not a guest, for he was neither a traveler, wayfarer, or transient comer. It is insisted: 1. He was a neighbor; 2. He came at a fixed rate; 3. He came for a definite time, and specified that he should be located with the families, the regular boarders, and not with the transients. It is argued that as to him the hotel was not an inn, but a boarding-house; that he received a lower rate, and ⁴²⁰ more limited liability was thereby incurred by the company.

An inn is defined as a house for the lodging and entertainment of travelers: *People v. Jones*, 54 Barb. 311; *Lewis v. Hitchcock*, 10 Fed. Rep. 4. "A house where a traveler is furnished with everything he has occasion for while on the way": *Thompson v. Lacy*, 3 Barn. & Ald. 286. "Inns are houses for the entertainment of travelers—wayfarers, as they are called": *Caylis' Case*, 8 Co. 32; *Willard v. Reinhardt*, 2 E. D. Smith, 148; 11 Am. & Eng. Ency. of Law, Inns, 7; *Bacon's Abridgment*, Inns and Innkeepers; 3 Story on Bailments, sec. 475.

So it has been held that common inns are instituted for pas-

sengers and wayfaring men; therefore, if a neighbor, who is no traveler, lodges there, and his goods be stolen, he shall not have an action: *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762. The prominent idea of the term "guest" is that he must be a traveler, wayfarer, or transient comer to an inn for lodging or entertainment: 11 Am. & Eng. Ency. of Law, 13. "Everyone who is received into an inn and has entertainment there, for which the innkeeper has remuneration or reward for his service, is a guest. The relation of host and guest exists. This general definition, however, only includes those who are, in a legal sense, travelers or wayfarers, and boarders or persons who reside in the same place are not embraced by it. It is only travelers or wayfarers that innkeepers are bound to ⁴²¹ accept as guests, and it is to them alone that he is under extraordinary responsibility for the safekeeping of beast and goods": *Russel v. Fagan*, 7 Houst. 389; *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242.

"The basis of this restriction is the peculiar liability of innkeepers to those who, as strangers and sojourners, are compelled to put up in an inn without knowing the character of the house. The liability of innkeepers is strict, and justly so, but it is a liability limited to their relation to travelers or wayfaring men. The law of civilized countries benignantly protects men away from home and from those resources with which the denizen or citizen can guard himself from wrong and protect his property from loss or injury": *Hornor v. Harvey*, 3 N. Mex. 197.

"When a traveler comes to an inn and is accepted, he instantly becomes a guest. The innkeeper, when he accepts him and his goods, becomes his insurer, and the innkeeper must answer in damages for the loss or injury of all goods, money, and baggage of his guest brought within his inn and delivered into his charge and custody, according to the usage of travelers and innkeepers; but he must be a guest, and before he can be a guest he must be a traveler. When he ceases to be a traveler or a transient or a wayfaring man, and takes up a permanent abode, even in an inn, he ceases to be an object of the law's especial solicitude, and he is no longer a guest, but a boarder; no longer a traveler, but a citizen": *Hornor v. Harvey*, 3 N. Mex. 197.

⁴²² Again, in *Russel v. Fagan*, 7 Houst. 389, Chief Justice Comegys said: "It is said that inns exist for the benefit of the traveling community. In fact, they are almost as much a necessity to travelers as the public means of locomotion are. In them wayfaring people of every kind, if they can afford the expense which the host charges for that service, can be accommodated

with diet and lodging; in other words, can be entertained in their journeyings. The necessities of such people oblige them to solicit entertainment at the public or common inn, both for themselves and their beasts, where they travel with such, otherwise they would be without shelter and food. Because of this necessity, and that the host or entertainer is generally unknown to a party resorting to his house or inn, and that such party is compelled to trust himself and his property to his keeping, and that he is charged by the innkeeper for entertainment of himself and his beasts and the custody of his property, the law holds the innkeeper to a strict liability, not from any contract between the parties, but from the duty growing out of his public employment."

"It is said that there are two classes of persons who are entertained by innkeepers for reward, guests and boarders. The distinction between a guest and boarder, which it is difficult to draw, and which is variously stated, is based mainly upon the fact that boarders contract for a definite stay at specific prices."

⁴²³ In *Lawrence v. Howard*, 1 Utah, 142, the court said: "In this country, hotel-keepers act in a double capacity, being both innkeepers and boarding-house keepers. As innkeepers, they entertain travelers and transient persons, those who come without bargain as to time or price and go away at pleasure, paying for only actual entertainment received. As boarding-house keepers, they entertain resident and regular boarders for definite lengths of time, and at specific prices previously agreed upon."

In *Shoecraft v. Bailey*, 25 Iowa, 553, the distinction between a guest and boarder seems to be this: "The guest comes without any bargain for time, and remains without one, and may go whenever he pleases, paying only for the actual entertainment he receives, and it is not enough to make one a boarder and not a guest that he stayed for a long time in the inn in this way."

The case of *Manning v. Wells*, 9 Humph. 746, 51 Am. Dec. 688, is to the same effect. In that case it appeared plaintiff was boarding at the house of defendant, who kept a public inn in the city of Memphis, at twelve dollars and fifty cents per month, and lodged in a room that had no lock on the door, and that during the night, while he slept, his coat, worth twelve dollars and fifty cents, was stolen. The trial judge charged the jury that defendant was liable for the coat if lost or stolen from his house, unless it happened by the act of God or the public enemy, but, if the plaintiff had exclusive use and possession of the room, then the defendant would ⁴²⁴ not be liable. The jury found for the plaintiff the

value of the coat, and the defendant appealed to this court. Said Judge Green, viz.: "The doctrine stated by his honor is certainly the true one as applicable to the goods of a guest in an inn, but a guest is a traveler or wayfarer who comes to an inn and is accepted: Story on Bailments, sec. 477. A neighbor or friend who comes to an inn, on the invitation of the innkeeper, is not deemed a guest: Bacon's Abridgment, Inn and Innkeeper; 5 Comyn's Digest, Action on Cases for Negligence, B. 2. Nor is a person a guest, in the sense of the law, who comes upon a special contract to board and sojourn at an inn; he is deemed a boarder, and, if he is robbed, the host is not answerable for it: 5 Bacon's Abridgment, Inn and Innkeeper, 5.

"These principles are settled by the authorities, and founded in sound reason. A passenger or wayfarer may be an entire stranger. He must put up and lodge at the inn to which his day's journey may bring him. It is, therefore, important that he should be protected by the most stringent rules of law, enforcing the liability of the innkeeper. In such case, therefore, the law makes the innkeeper the insurer of the goods of his guest, except as to losses occasioned by the act of God or public enemies. But as a boarder does not need such protection, the law does not afford it. It is sufficient to give him a remedy when he shall prove the innkeeper has been guilty of culpable negligence": 425 See 4 Am. & Eng. Ency. of Law, 2d ed., tit. Board, 592.

These authorities we think conclusive of the question presented by the first assignment of error, for it must be conceded, upon the undisputed facts in the record, that plaintiff and wife were mere boarders in defendant's hotel, and while occupying this relation the proprietors were not insurers of their property, but are only liable for culpable negligence. There being no proof of negligence, or that the articles were purloined by any employé of the defendant, the company is not liable: Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 42 Am. St. Rep. 902.

Affirmed.

INNKEEPERS—LIABILITY TO BOARDERS.—An innkeeper is not liable for the loss of goods or baggage of a boarder unless occasioned by the negligence of himself or servants: Notes to Taylor v. Downey, 53 Am. St. Rep. 476; Fay v. Pacific Imp. Co., 27 Am. St. Rep. 203, and cases therein cited.

INNKEEPERS—GUESTS, WHO ARE.—Where the parties were both residents of the same town, but the plaintiff stopped over night at the defendant's inn there, it was held that the relation of innkeeper and guest existed. But where a family had resided several years in St. Paul, and became inmates of a hotel there for no

stated period, and at no special rates less than transient, and so remained for several months, they were held to be boarders: Note to *Hancock v. Rand*, 46 Am. Rep. 119, 121. Upon a somewhat similar state of facts in the last cited case, a family were held to be guests. On the question of who are guests and who boarders, see notes to *Singer Mfg. Co. v. Miller*, 38 Am. St. Rep. 569; *McDaniels v. Robinson*, 62 Am. Dec. 586-592.

SCHILLING v. DARMODY.

[102 TENNESSEE, 439.]

HUSBAND AND WIFE—MARRIAGE, EFFECT OF ON PREVIOUS CONTRACTS—MORTGAGES.—If a man takes a mortgage from a woman, his subsequent marriage to her, in the absence of an express contract, operates of itself as a satisfaction of the mortgage debt and as a discharge and release of the mortgage.

HUSBAND AND WIFE—EFFECT OF MARRIAGE ON PREVIOUS CONTRACTS BETWEEN.—Contracts between husband and wife before marriage become, by their matrimonial union, utterly extinguished in the absence of express contract to the contrary.

MORTGAGES—PAYMENT—REVESTING OF TITLE.—The payment or satisfaction of a debt secured by mortgage operates, ipso facto, to revest the title in the mortgagor without a reconveyance.

HUSBAND AND WIFE—MARRIAGE AS EXTINGUISHMENT OF DEBT—CLOUD ON TITLE.—The heir of a woman who has given a trust deed upon land to secure her debt to a man whom she subsequently marries need not, in order to remove the trust deed as a cloud upon the title to the land, pay the amount which the deed was executed to secure. In such case, the debt and trust deed are extinguished by such marriage.

APPELLATE PRACTICE.—THE SUPREME COURT cannot remand a case without final disposition thereof on the merits, on the ground that full proof of the facts were not made, and to enable the making of such proof in the trial court, when the applicant has had full opportunity to establish such facts, and his failure to do so must be attributed to inability or negligence upon the trial.

H. C. Warinner, for the appellant.

J. H. Malone, R. L. Bartels, and W. B. Glisson, for the appellee.

440 **WILKES, J.** This is a bill to enjoin the foreclosure of a deed of trust, and have the same set aside as a cloud upon complainant's title upon certain real estate, and to have the debt secured originally by said trust deed declared satisfied and extinguished. The chancellor granted the relief prayed, and defendant has brought the record before us for examination, upon writ of error.

It appears that Henrietta Schilling, while a widow, borrowed from defendant, Darmody, seventeen hundred dollars, for which she executed her note to him. She also executed a deed of trust upon her house and lot, to secure this note, to W. B. Glisson, trustee. This was in April, 1886. Mrs. Schilling was then keeping a boarding-house in Memphis, and defendant ⁴⁴¹ and his family were boarding with her. Afterward they intermarried. There was no marriage contract or agreement fixing the property rights of either after marriage. In 1894 Mrs. Darmody (née Schilling) died intestate, leaving complainant as her only heir, and defendant, her late husband, became her administrator. Defendant demanded of complainant payment of the note, which was refused, and he thereupon proceeded to foreclose the deed of trust, when he was enjoined by the bill in this case. The claim made in the bill is, in short, that the marriage of the parties operated by law as an extinguishment and satisfaction of the debt. The defendant by answer denies that such was the legal result of the marriage, and states that the parties continued to treat and regard the note and mortgage as existing obligations after as before the marriage. There was no cross-bill. No proof was taken except an agreement, in lieu of proof, that after the marriage the wife obtained a loan upon this real estate from a building and loan association, and executed to it a deed of trust, in which the property was represented and warranted to be unencumbered, and as the property of the wife. The husband and wife joined in executing this mortgage, and there was a provision that, in case of sale to pay the debt, the surplus should go to Mrs. Darmody. The deed of trust from Mrs. Schilling to her subsequent husband was not registered until after her death.

It is insisted the court erred in holding that the ⁴⁴² note had been satisfied by the marriage of the parties, and that it should not have directed its cancellation and the satisfaction and setting aside of the trust deed without at the same time requiring the amount due defendant to be repaid him, as evidenced by the note and trust deed.

It is conceded that at common law the marriage of the mortgagor to the mortgagee would operate as a satisfaction of the mortgage debt and discharge and release of the trust. But it is insisted that the rules of common law have, by statute, in Tennessee, been changed in many respects, and, while there is no statute directly bearing on this point, yet the trend of legislation and judicial decision is in the direction of emancipation of mar-

ried women and placing them upon the basis of *femes sole*. It may be granted that this is true so far as legislation extends, and it may also be granted that the courts have recognized these innovations upon the common law and enforced them when authorized, but the courts have not gone beyond the legislation and laid down any rules in regard to the property rights of married women not authorized by statute, on the idea that such rules are in accord with the general trend of legislation. The courts have followed the legislation, but have not gone ahead of it, and, unless the rules of the common law have been expressly changed by statute, they are in full force in Tennessee: *Joiner v. Franklin*, 12 Lea, 422; *Cox v. Scott*, 9 Baxt. 305.

⁴⁴³ It is highly possible that legislation, in its process of emancipating woman by statute, may succeed in making her the equal of man in every respect, notwithstanding she has always been his superior, but the courts can only follow, and not lead, in this experiment, and these rules in regard to married women apply in courts of equity as well as in courts of law. Courts of equity have, however, always recognized certain rights of married women and enforced them, even where they are not recognized in courts of law, such as the right of the wife to a settlement out of her personal estate as against her husband or his creditors and her marriage contracts with her intended husband and contracts with regard to her separate estate.

Mr. Story, in his work on Equity Jurisprudence, volume 2, section 1370, says: "By the general rules of law the contracts between husband and wife before marriage become, by their matrimonial union, utterly extinguished. Thus, for example, if a man should give a bond to his wife, or a wife to her husband, before marriage, the contract thereby created would, at law, be discharged by the intermarriage. Courts of equity, though they generally follow the same doctrine, will, in special cases, in furtherance of the manifest intentions or objects of the parties, carry into effect such a contract made before marriage between husband and wife, although it would be avoided at law." As, for illustration, "An agreement made between husband and wife before marriage, ⁴⁴⁴ for a settlement of their separate estates, will be enforced in equity, though void at law, for equity will not suffer the intentions of the parties to be defeated by the very act (marriage) which is designed to give effect to such contract": See *Bennett v. Winfield*, 4 Heisk. 440; *McC Campbell v. McC Campbell*, 2 Lea, 661, 31 Am. Dec. 623; *Castellar v. Simmons*, 1 Tenn. Cas. 65.

But in these and similar cases the contracts and agreements are enforced because the parties intended them to remain and be in force notwithstanding the marital relation, and so provided by express agreement. In the present case, no feature of that kind exists. The loan and trust deed were not made, so far as the record shows, in contemplation of marriage, and there was no agreement that the debt should continue in force after the marriage, and the parties made no provision by contract to change the legal effect of the marriage union.

In Indiana, where the rights of married women are very much the same as in Tennessee, the almost exact question here presented was elaborately considered in the case of *Long v. Kinney*, 49 Ind. 235. The facts are as follows: On January 8, 1872, Eliza McCabe, a single woman, executed a mortgage on real estate to Michael Kinney, to secure the payment, at maturity, of a promissory note made by said Eliza McCabe, payable to said Michael Kinney. Some time after the execution of the note and mortgage, Eliza McCabe and Michael Kinney intermarried. ⁴⁴⁵ After the marriage, Michael Kinney transferred the note and mortgage to one Long. Long brought suit against Kinney and his wife, and sought to foreclose the mortgage. The wife insisted that by her marriage to Kinney the note and mortgage were dissolved and discharged. The syllabus of the case is: "An unmarried woman executed a note and mortgage on her real estate to secure its payment, and afterward married the payee of the note. The mortgagee, after the marriage, assigned the mortgage and delivered the note to a third person, who brought suit to foreclose the mortgage."

It was held, in substance, that by the marriage the debt and mortgage were discharged and the action could not be maintained. This case goes fully into the whole question, showing that the rule at common law was well established, and could not be changed, except by express statutory enactments, and that although under the statutes of Indiana declaring that both her real and personal property should remain her own, after marriage as before, there was "no statute which attempts to save the right of action of the husband against the wife on contracts entered into by her before the marriage." Authorities were cited, and it was shown that the case presented did not fall within the exceptions allowed in courts of equity, which exceptions relate to marriage contracts and the like, the performance of which is intended to take place after marriage. The court cites as authorities 1 Blackstone's Commentaries, ⁴⁴⁶ 442; 1 Kent's Com-

mentaries, 129; Story's Equity Jurisprudence, secs. 1367, 1370. To the same effect see *Barnett v. Harshbarger*, 105 Ind. 410; *Henneger v. Lomas*, 145 Ind. 287; *Cord on Married Women*, sec. 154, p. 82; *Reeves on Domestic Relations*, 53, *2; 167, *2; and cases cited above from Tennessee reports. A case in apparent conflict is that of *Power v. Lester*, 23 N. Y. 527. The syllabus is: "The marriage of a female mortgagee with the mortgagor, since the act for protection of married women (Laws 1848, c. 200), does not extinguish her rights of action on the mortgage. Where such mortgagee unites with her husband in a junior mortgage of the same land, the act affects only her inchoate dower interest, but does not, in the absence of words for that purpose, impair her right to priority of lien."

The facts were that a suit was instituted to foreclose a mortgage bearing date April 1, 1861, executed by Melvin Power to plaintiff, upon certain land, to secure a bond of nine hundred and fifty-one dollars and ninety-two cents, due April 1, 1855. Melvin Power (mortgagor) married the plaintiff, the creditor and mortgagee, in the year 1852. After marriage, and in 1856, Mrs. Lester, the plaintiff, united with her husband in another mortgage embracing, with the land in the previous mortgage, a large amount of other lands, to secure to Lester her husband's bond for sixty thousand dollars. This mortgage by no words purported to affect the wife's separate estate, and no words indicated that it was ⁴⁴⁷ to operate on her mortgage. Lester foreclosed the mortgage in his favor, and at the sale bought in all the lands embraced in the mortgage to him, but the rights of the wife in the lands mortgaged to her were reserved in the foreclosure decree. She filed her bill against Lester to establish her prior right, and it was held that there was still due her fifteen hundred and sixteen dollars and ninety-eight cents, and the usual decree was pronounced in her favor, and Lester appealed.

The court of appeals fully recognized the rule of unity at common law and its legal effect, but adverted to the fact that the common-law rule had been changed by statute in New York (1848, 1849). That statute declares "that the property of any female who shall thereafter marry, and which she shall own at the time of the marriage, shall continue her separate estate, as if she were a single woman," and that this was an express change in the common-law rule, which left no doubt for construction. In that case the female creditor afterward became the wife of the debtor, and as the statute expressly and plainly reserved her rights in the property she owned at the time of her marriage,

this debt and mortgage, which were her personalty, were reserved to her by the plain statute, in derogation of the common-law rule, which would have extinguished her claim. It is probable that in New York no such legislation exists, changing the common-law rule as to the effect of the marriage upon the husband's rights, when he occupies the ⁴⁴⁸ status of creditor. At all events, that case is wholly different from the one at bar, and is based upon a plain, positive, express statutory provision. No such statute exists in Tennessee. The husband, as before, takes the wife's personalty as at common law, subject alone to the right of her creditors. Under a statute in New York the unity of persons which disabled the wife from suing her husband, has also been repealed: N. Y. Code, sec. 114. And so in *Butler v. Ives*, 139 Mass. 202, and *Wright v. Wright*, 54 N. Y. 437, it was held that the note remained in force, notwithstanding the marriage, but this was by virtue of the special statutes of Massachusetts and New York changing the common-law rule as to the effect and result of a marriage.

If we are correct in holding that the note was satisfied and discharged by the result and by virtue of the marriage, there remains but little more to be considered in the case. The trust deed provides upon its face that if the note shall be paid, the deed shall be satisfied and quitclaimed according to law.

It has been repeatedly held that on payment of a mortgage or trust debt by the debtor, the estate of the mortgagee or trustee ceases and the legal title reverts in the mortgagor or grantor ipso facto, without a reconveyance. This upon the idea that a trustee takes only such title and estate as is required for his trust: *Hannum v. Wallace*, 4 Humph. ⁴⁴⁹ 143; *Ross v. Young*, 5 Sneed, 627; *Carter v. Taylor*, 3 Head, 30.

The doctrine invoked, that a party who seeks the aid of a court of equity must first do equity, and that the court will not remove a cloud upon a title and decree a cancellation of a deed and a revestiture of title except on condition that the debt which the deed was executed to secure be paid, is not applicable in this case, for the debt is paid and the mortgage is satisfied, in our view of the case, and complainant is entitled to have it so declared when an attempt to enforce it is made, as is done in this case.

The title, having reverted in the mother of the complainant by the satisfaction of the note, descended to him upon her death, as there was no child by her marriage with Darmody, and, being the heir, he is entitled to have the cloud removed therefrom.

It is insisted that the court, in any event, should remand the cause, without a final disposition on the merits, to the court below, to the end that full proof may be made of circumstances and facts to show that the parties intended to keep the debt in force after the marriage as before. This insistence was made in the answer, and it must be presumed that if there was such proof or circumstances from which such intention could be inferred, it would have been shown. The case does not fall within ⁴⁵⁰ the provisions of the statute (Shannon's Comp. Stats., sec. 4905), because defendant has had full opportunity to establish such facts if they existed, and the failure to do so must be imputed either to inability so to do or negligence in not doing so in the court below.

The decree of the court below is affirmed with cost.

THE PAYMENT OF A MORTGAGE DEBT extinguishes the debt, and the title vests in the mortgagor without release or reconveyance: *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71; *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334; *Perkins v. Sterne*, 28 Tex. 561, 78 Am. Dec. 72.

APPEAL.—A CAUSE WILL NOT BE REMANDED for further proceedings unless the record shows that the ends of justice will be promoted thereby: *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174; but whenever it appears from the record on appeal that an action cannot be determined on its merits, it must be remanded: *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339.

Effect of Marriage on Antenuptial Contracts between Husband and Wife.

Common-law Rule.—By the general rules of the common law, contracts of any nature entered into by a man and woman become, by their subsequent matrimonial union, utterly extinguished. A debt due by a husband to his wife, or by a wife to her husband, before their marriage is extinguished, under the rule of the common law, because her choses in action, rights, and personal property vest in him upon their marriage, and she ceases to have a separate legal existence. This rule prevails in those states where it has not been expressly abrogated by statute: *Flenner v. Flenner*, 29 Ind. 564; *Clark v. Clark*, 49 Ill. App. 163; *Barton v. Barton*, 32 Md. 214; *Chapman v. Kellogg*, 102 Mass. 246.

If, before a marriage is consummated, a contract is entered into between the parties thereto, whereby the marital rights of the husband are expressly excluded, equity will, after the marriage, enforce such contract in favor of the wife, against the husband and those in privity with him. The intention to create or preserve such separate estate in the wife must clearly appear, but no particular form of words is necessary to this purpose: *Bennett v. Winfield*, 4 Heisk. 440-444. In the absence of statute or express agreement, marriage abrogates all debts between the parties to it: *Burleigh v.*

Coffin, 22 N. H. 118, 53 Am. Dec. 236. The intermarriage of one of the obligors in a covenant with one of the obligees therein extinguishes the debt, and the death of the feme obligee does not revive the action against her husband and his co-obligor, in favor of her co-obligee: *Suttles v. Whitlock*, 4 T. B. Mon. 451. In *Long v. Kinney*, 49 Ind. 235, it appeared that an unmarried woman executed a note and mortgage on her real estate to secure its payment, and afterward married the payee of the note, the mortgagee, who afterward assigned the mortgage and delivered the note to a third person, who brought suit to foreclose the mortgage, and it was held that, by such marriage, the debt and mortgage were discharged, and that the action could not be maintained: *Long v. Kinney*, 49 Ind. 235. A debt due to a woman is extinguished by her intermarriage with the debtor, and she cannot recover it from his estate after his decease: *Smiley v. Smiley*, 18 Ohio St. 543. If an attorney contracts to employ a woman as a clerk for so long a time as he practices law, payment not to be made until he retires from practice, and the parties are subsequently married, the contract is merged and abrogated, and the wife cannot enforce it. The "married woman's act" does save from extinguishment by marriage of the parties a contract relating solely to personal services to be rendered by the woman for the man, for a consideration. Such a contract is not property, within the meaning of such act continuing the woman's separate property after marriage: *Matter of Callister*, 153 N. Y. 294, 60 Am. St. Rep. 620.

Effect of Married Woman's Acts.—In a number, and perhaps in a majority, of the states of the federal Union, statutes have been enacted and are in force which enable a married woman to hold to her sole and separate use all property, both real and personal, belonging to her at the time of the marriage. The effect of such statutes is to prevent a contract or debt between the parties to a marriage from becoming merged or extinguished by the subsequent marriage. Thus, under such a statute, a widow may maintain an action at law against the executors of her deceased husband to recover money which she loaned to him before marriage: *Barton v. Barton*, 32 Md. 214. If a woman mortgages her land to secure a debt of a third person, her subsequent marriage to the mortgagee does not extinguish the mortgage, and, after his death, his legal representatives may enforce it: *Bemis v. Call*, 10 Allen. 512. The marriage of a female mortgagee with the mortgagor does not extinguish her right of action upon the mortgage: *Power v. Lester*, 23 N. Y. 527.

A wife may maintain an action against her husband to recover money due upon a note executed by him to her before their marriage, and which is the separate property of the wife. The statute giving the husband the management and control of the separate property of the wife during marriage does not affect the right of the wife to bring such action: *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194;

Wright v. Wright, 59 Barb. 505; 54 N. Y. 437. If a woman assigns by delivery a note payable to her order, and afterward marries the maker, her indorsement after the marriage transfers the legal title to the note, and suit may be maintained thereon: **Guptill v. Horne**, 63 Me. 405. A woman who is divorced can maintain an action against her former husband for personal services performed for him before their marriage: **Carlton v. Carlton**, 72 Me. 115, 39 Am. Rep. 307. This case is in conflict with that of **Matter of Callister**, 153 N. Y. 294, 60 Am. St. Rep. 620, wherein it was held that such services, or a contract therefor, were not property, "and was merged and extinguished by the marriage of the parties." In **Carlton v. Carlton**, 72 Me. 116, 39 Am. Rep. 307, it is said, however, that "the word 'property' includes choses in action as well as choses in possession. It includes money due as well as money possessed. It includes money due for personal services as well as money due for anything else. In its broadest sense it includes everything which goes to make up one's wealth or estate."

A judgment obtained by the wife against the husband before the marriage remains the separate property of the wife under the statute, and she may enforce its payment by execution after the marriage: **Flenner v. Flenner**, 29 Ind. 565. The husband may maintain an action against his wife, after their marriage, to recover money loaned by him to her, at her request, before their marriage: **Clark v. Clark**, 49 Ill. App. 163.

Independent of statute, an administratrix marrying the obligor in a bond payable to her in her representative capacity, does not thereby extinguish the debt, but merely suspends the right of action during coverture and while she continues administratrix: **King v. Green**, 2 Stew. 133, 19 Am. Dec. 46.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

WILLIAMSON v. STATE.

[39 TEXAS CRIMINAL REPORTS, 60.]

BURGLARY — “HOUSE” — WHAT IS NOT.—A PORTABLE “HEADER BOX,” fourteen feet long, six feet wide, four feet high on one side, and eighteen inches on the other, such as is commonly used with a grain harvester, is not a “house” within the contemplation of a statute relating to burglary, although it has four sides and is covered over, for it has no permanency of location or fixedness of place, and is not used, or intended to be used, in any way or for any purpose connected with a habitation, or other purposes for which houses are ordinarily used.

Frank P. McGhee, for the appellant.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

⁶¹ **DAVIDSON, J.** Appellant was convicted of burglary, and appeals. The indictment is in the usual form, and contains two counts. The first charges a burglary at night, and the second in the daytime. There are several questions presented by the record, but, under the view we take of the case, it is not necessary to discuss any of them, except the insufficiency of the testimony to support the judgment of conviction. The testimony is very brief, and shows without contradiction that the “house” alleged to have been burglarized was described as follows: “What is commonly known as a ‘header box’ herein described. . . . The header box is the kind usually used in connection with the harvester to hold heads in, and the grain heads cut off are conveyed to a place where the grain is stacked or threshed as it is cut, and this particular box was about two

hundred yards from where the oats had been threshed. The box was constructed of lumber, and the sides, ends, and bottom were closed, and substantially joined together." It was covered with a wagon sheet securely fastened, so that the oats could not be taken from the box without in some way forcibly removing the cover. "By actual measurement, the box was four feet high on one side and eighteen inches on the opposite side, with ends sloping from one side to the other; was sloping as such boxes usually are. It was fourteen feet long and six feet wide, and held about one hundred and fifty or two hundred bushels of threshed oats." The question here is, Was this a "house," within contemplation of the statute of burglary? We are of opinion that it was not. It is true that it had four sides, and was covered over, but it was nevertheless a box, and not a house. All boxes which contain goods—shoes, groceries, etc.—for shipment would be houses if this box is held to be one. The evidence excludes the idea of permanency of location or fixedness of place in regard to this house. It was portable, and made for the express purpose of being carried from place to place for the purpose of holding the heads cut from grain, or of grain after it was threshed; and was not used, or intended to be used, in any way or for any purpose connected with a habitation, or other purposes for which houses are ordinarily used. Some of our cases have gone to a considerable extent in holding certain character of structures houses, but in all such it will be found that they were fixtures: See *Anderson v. State*, 17 Tex. Cr. App. 306; *Bigham v. State*, 31 Tex. Cr. Rep. 244; *Willis v. State*, 33 Tex. Cr. Rep. 168. We would not be understood as holding that it is absolutely necessary that the structure, in order to be considered a house, should be fixed to the soil, or that because it is portable it would not be considered a house. But we do hold, under the proof in this case, that this was not a house, but a mere box, constituting a part of the outfit for the thresher.

The judgment is reversed and the cause remanded.

BURGLARY.—A "HOUSE," in the sense of a statute relating to burglary, is any structure which has walls on all sides and is covered by a roof: See monographic note to *People v. Richards*, 2 Am. St. Rep. 389, on burglary. Compare *Favro v. State*, 39 Tex. Cr. Rep. 452, post, p. 950; and see *Williams v. State*, 105 Ga. 814, 70 Am. St. Rep. 82.

TALBUTT v. STATE.

[89 TEXAS CRIMINAL REPORTS, 64.]

INTERSTATE COMMERCE—OCCUPATION TAX—UNCONSTITUTIONALITY.—A state statute which levies a tax upon the business and occupation of selling lightning rods, which are manufactured in one state and sold in another, upon orders taken by a traveling salesman, is violative of the federal constitution, as being a tax upon interstate commerce, and is therefore void.

Conviction for pursuing the business or occupation of canvassing for the sale of lightning rods without paying the occupation tax and obtaining a license. The defendant appealed.

Hazelwood & Smith, for the appellant.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

⁶⁵ DAVIDSON, J. The offense was committed in January, 1898. The punishment was assessed at a fine of one hundred and fifty dollars. The evidence shows that the appellant was representing Cole Brothers, who resided in Greencastle, Putnam County, Indiana, and who carried on their business at that place. Cole Brothers have not, and never have had, a place of business within the limits of the state of Texas, and appellant is their agent and representative soliciting orders for the placing of lightning rods on houses in Grayson county, and, when the orders are secured, they are sent to the place of business of Cole Brothers, at Greencastle, Indiana. Lightning rods were then made in obedience to said orders, shipped to Texas, and, when required to do so, appellant assisted in placing these lightning rods at the places desired by the purchasers. For this he collected the money for the sale, or took notes, as the case might be. Without going into any discussion of the matter further than heretofore, we hold that the conviction was erroneous. This seems, under the decisions of the supreme court of the United States, to be a tax upon interstate commerce: See *Ex parte Holman*, 36 Tex. Cr. Rep. 255; *Brennan v. Titusville*, 153 U. S. 289; *Asher v. Texas*, 128 U. S. 129; *Corson v. Maryland*, 120 U. S. 502; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489.

The judgment is reversed and the cause remanded.

INTERSTATE COMMERCE—TAXATION OF, BY STATE.—No state has a right to lay a tax on interstate commerce in any form, and cannot tax the occupation or business of carrying it on: Note to *Arnold v. Yanders*, 60 Am. St. Rep. 756.

SQUIRES v. STATE.

[39 TEXAS CRIMINAL REPORTS, 96.]

LIBEL—INNUENDO.—THE OFFICE of an innuendo, in an action for libel, is to aver a meaning of the language published.

LIBEL—INDICTMENT FOR—SUFFICIENCY OF.—An indictment for libel, alleging that the publication of a certain instrument was libelous, under the statute, in two respects, namely, that the libelee, being a candidate for office was dishonest, and therefore unworthy of such office; and that he had been guilty of an act which, though not a penal offense, was disgraceful to him as a member of society, and which would naturally bring him into contempt among honorable persons, is sufficient, though it has no innuendo or explanatory allegations, if it contains allegations of inducement, and the instrument set out therein does not require any explanatory averment to ascertain its libelous character, or against whom directed.

LIBEL—INDICTMENT FOR—CHARGE OF DISHONESTY AGAINST CANDIDATE FOR OFFICE—WHEN INSUFFICIENT. A publication concerning a candidate for office is not libelous unless there is an imputation of dishonesty such as goes to his personal integrity, and which renders him unfit to be trusted with official duties. Hence, an indictment for libel cannot be sustained where the matter charged is that the candidate was unfaithful to the party which had nominated him; and that, while he was such nominee, he was secretly conniving with an opposing party for its support, for this does not indicate such a want of personal honesty as would render him unworthy of holding an office, though it does suggest a want of such high moral principle as should actuate a party's standard bearer.

LIBEL—INDICTMENT FOR—CHARGE OF DISGRACEFUL ACT BY CANDIDATE FOR OFFICE—WHEN SUFFICIENT. A charge, in an indictment for libel, that the prosecutor, who was a candidate for office, had written and signed a secret circular, abnegating the principles of his own party, and professing a belief in the principles of an opposing party, and had sent the same abroad to certain persons, thus treacherously seeking their support in his election, places him, if the circular was true, in the attitude of a hypocrite and a traitor. Such a charge is, therefore, a libel, for it is calculated to bring him into disgrace and reproach among gentlemen, and should justly subject him to the contempt of all honorable persons.

WITNESSES—PLACING UNDER THE RULE.—The matter of placing witnesses under the rule is much in the discretion of the court, but, when the rule is invoked, the order of exclusion should apply to all of the witnesses, unless some good reason is shown for making an exception.

LIBEL—INDICTMENT FOR—INSTRUCTIONS.—If an indictment for libel contains two propositions, one libelous and the other not, the former should be submitted to the jury, under appropriate instructions, but they should be instructed to ignore or disregard the latter proposition.

Conviction of libel. The defendant made a motion to quash the indictment on the grounds stated in the opinion, but the motion was overruled. The court, in its charge to the jury,

submitted the case upon that phase of the indictment which did not charge a libel under the law, and omitted to submit to the jury the only ground of libel charged by the allegations of the indictment. The defendant appealed.

Stephens & Huff and Joe E. Cockrell, for the appellant.

W. T. Allen, county attorney of Clay county, and Mann Trice, assistant attorney general, for the state.

102 HENDERSON, J. Appellant was convicted of libel, and his punishment assessed at a fine of five hundred dollars; hence this appeal.

Appellant made a motion to quash the information, on the ground that the language of the letter or circular alleged to be libelous, and the innuendoes and statements relative thereto set forth in said information, do not show that the accused was guilty of such dishonest or disgraceful conduct as would constitute a libel under the penal laws of this state, and for the further reason that the information does not show that L. J. Walker was a candidate for any office, or that any election was then pending in Clay county, nor when any election would take place, nor that the principles of the Third or Populist party were such as to make an individual dishonest or disresponsible in the county, nor that there was any difference between the principles of the Democratic and Populist parties, nor that defendant had any knowledge of said facts. In order to present the matter clearly, we insert the charging part of the information, which is in two counts: That appellant "did, without lawful authority, and with intent to injure the reputation of L. J. Walker, unlawfully, willfully, and maliciously make, publish, and circulate a certain written and printed statement purporting to be the act of another person, to wit, the act of L. J. Walker, of and concerning the said L. J. Walker, which said written and printed statement is to the tenor following, to wit: '(Confidential.) Henrietta, Texas, 1894. To the People's Party Club, Texas: I send you this circular letter to inform you that I am in sympathy with your party, and believe in your platform and the principles enunciated therein. I expected your party, at its convention held, to ratify my nomination as county clerk of Clay county. In this I was disappointed. Should the voters of your club think it advisable to aid me and give me your support at the coming November election, I will **103** take it as a favor, and appreciate the same. Should you support me by your

votes, I will promise to affiliate and advocate the principles of your party two years hence, should it be successful at the coming election in November. Should the People's party fail at the coming November election, I believe the American Protective Association party will be the coming party of the future. I inclose you the platform of its principles, and you will please have the same read before your club. Yours respectfully, L. J. Walker. N. B. Please do not show this circular letter to any Cleveland, Clark, Goldbug Democrat, or any Hogg Silverite Democrat, as I have no faith in the principles advocated by either of them. Respectively, L. J. Walker.' And, at the time said written and printed statement was made, published, and circulated as aforesaid, the said L. J. Walker was a candidate for the office of county clerk of Clay county, Texas, and was then and there running for said office of county clerk of Clay county, Texas, as a Democrat, and was running for said office upon the Democratic ticket, and was then and there the nominee of the Democratic party of Clay county, Texas, for said office of county clerk of Clay county, Texas, and that said written and printed statement above set out is and was a libelous and malicious statement, and conveyed the idea that the said L. J. Walker was a candidate for the office of county clerk of Clay county, Texas, and that he, the said L. J. Walker, was and is dishonest, treacherous, and hypocritical in his political professions, and is and was therefore unworthy of said office of county clerk of Clay county, Texas; and said libelous and malicious statement conveyed the idea that the said L. J. Walker had been guilty of an act which, though not a penal offense, is and was disgraceful to him as a member of society, and the natural consequence of which act is and would have been to bring him into contempt among honorable persons. And, by way of second count herein, comes W. T. Allen, county attorney in and for Clay county, state of Texas, and presents in and to the county court of said county that heretofore, to wit, on the twenty-fifth day of August, A. D. 1894, in said county of Clay and state of Texas, he, the said L. J. Walker, was a candidate for and running on the Democratic ticket for the office of county clerk of Clay county, Texas, and that he was running as a Democrat; that he was then and there a Democrat, and was not in sympathy with, and was not a believer in, many of the leading principles and doctrines of the so-called 'People's party,' otherwise known as the 'Third party,' which said last-named party was then and there opposing the nominees of the Democratic

party of said Clay county, and was seeking to defeat their election to the various offices for which the candidates of the said Democratic party were running, and was specially seeking to defeat and were opposed to the election of him, the said L. J. Walker; that the said L. J. Walker was not then and there, and never had been, in sympathy with the American Protective Association, nor with its aims and purposes; that the said Walker was then and there a nominee of the Democratic party in said Clay county for the office of county clerk. That on, to wit, the last-named date, one W. A. ¹⁰⁴ Squires, in said Clay county, Texas, without lawful authority, and with the intent to injure the reputation of the said L. J. Walker, and for the purpose of placing him in a false light before the people and the voters of Clay county, Texas, and for the purpose of defeating his election to the office for which he was then and there running as a Democrat, did unlawfully, willfully, and maliciously make, publish, and circulate among the voters of Clay county, Texas, a certain written and printed statement, purporting to be the act of another person, to wit, the act of the said L. J. Walker, of and concerning the said L. J. Walker, which said written and printed statement is to the tenor as follows, to wit [here is copied the instrument contained in the first count. *supra*]; that the said W. A. Squires, for the purpose of making said written and printed statement appear to be the act of the said L. J. Walker, unlawfully, wrongfully, maliciously, and without lawful authority, did then and there cause the name of him, the said L. J. Walker, to be affixed to said circular, whereby the statements therein contained were made to appear as the act, declaration, and statements of the said L. J. Walker; that, in truth, and in fact, said circular was not executed by him, the said L. J. Walker; that he never authorized the execution of the same; and that the same was not his act or deed, and was not made, printed, or circulated by or with his authority or consent, and the same did not contain his political belief and convictions; that said statement was libelous and malicious, and was made, published, and circulated by the said W. A. Squires for the purpose and with the intent of defeating him, the said L. J. Walker, in the race for county clerk, as aforesaid; that, at the time said W. A. Squires made, published, and circulated said libelous and malicious statement, the said L. J. Walker was a bona fide Democrat, and was not in sympathy with the so-called 'People's party,' and did not believe in their platform, nor in many of the leading principles therein enunciated—all

of which the said W. A. Squires then and there well knew; and that, with full knowledge of all of said facts, the said W. A. Squires unlawfully made and caused to be made, and circulated and caused to circulate, said libelous and malicious statement, for the purpose of injuring the reputation of him, the said L. J. Walker, and thereby causing him to be defeated for the office of county clerk, as aforesaid, at the election which was thereafter to be held on the sixth day of November, 1894; that said written and printed statement as above set out was and is libelous, and sought to convey, and did convey, the idea that the said L. J. Walker, while he was a candidate for said office of county clerk on the Democratic ticket, and while he was running as a Democrat, that in truth and in fact he was not a Democrat, but that he sympathized with, and was a believer in, the principles and platform of the so-called 'People's party,' and with the principles advocated by the American Protective Association; and that he was dishonest, treacherous, and hypocritical in his political profession; and that he was therefore unworthy of the confidence and support of the voters of Clay county for said office, and was therefore unworthy of said office. And ¹⁰⁵ said circular further sought to convey, and did convey, the idea that the said L. J. Walker was thus guilty of an act which, though not a penal offense, is and was disgraceful to him as a member of society, and the natural consequence of which act is and would have been to bring him into contempt among honorable persons, all of which the said W. A. Squires did on the day and date aforesaid, contrary to the form and statute in such cases made and provided, and against the peace and dignity of the state."

At common law, in a civil action, complaint for libel contained the following essential elements (see Townshend on Slander and Libel, secs. 308-337): 1. The inducement. "The office of this is to narrate the extrinsic circumstances which, coupled with the language published, affects its construction, and renders it actionable, where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. This being the office of the inducement, it follows that if the language does not naturally and per se refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous and equivocal, and requires explanation by some extrinsic matters to show its relation to the plaintiff, making it actionable, the complaint must allege, by way of inducement, the existence of

such extraneous matter." 2. The colloquium, which is a direct allegation that the language published was concerning the plaintiff or concerning the plaintiff and his affairs, or concerning the plaintiff and facts alleged as inducement. 3. The fact of publication by the defendant, and the words published. It is held that not all the words need be published, but only such as are relied upon as libelous or slanderous. "It is sufficient to set out the words which are material, and additional words, which do not diminish or alter the sense of the words directly alleged, may be omitted. But enough must be set forth to show the sense or connection in which the words set forth were used; otherwise there will be a variance, even if the precise words laid are proven to have been spoken." 4. The innuendoes, which may be alleged in connection with the published matter, or follow it. The office of an innuendo is to aver a meaning of the language published. An innuendo means nothing more than giving point or meaning as explanatory of a matter sufficiently expressed before. It may serve for an explanation, to point a meaning where there is precedent matter, expressed or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but cannot add to nor enlarge nor change the sense of the previous words. If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action. An innuendo helps nothing unless the words precedent have a violent presumption of the innuendo. The business of an innuendo is, by a reference to preceding matter, to fix more precisely the meaning. The office of an innuendo is to explain, not to extend, what has gone before, and it cannot enlarge ¹⁰⁶ the meaning of the words, unless it be connected with some matter of fact expressly averred. The innuendo "is only a link to attach together facts already known to the court." Applying these rules to the information, it will be seen that same contains what may be termed the "inducement," which, by the way, is held to be immaterial, whether it precedes or follows the alleged libelous matter; that it contains a colloquium, together with an allegation of publication. No innuendoes appear to have been used, the pleader doubtless apprehending that the instrument in question, as set out, on its face required no explanatory averment in order to ascertain its libelous character or against whom directed. In addition to this, the indictment alleged that said publication was libelous, under the statute,

in two respects—that, being a candidate for office, he was dishonest, and therefore unworthy of such office; and that he had been guilty of some act or omission which, though not a penal offense, was disgraceful to him as a member of society, and the natural consequence of which was to bring him into contempt among honorable persons. We believe the indictment was sufficient if the matter set out in the publication be slanderous: See *Woody v. State*, 16 Tex. Cr. App. 252; *Johnson v. State*, 31 Tex. Cr. Rep. 456; *State v. Schmitt*, 49 N. J. L. 579.

In his criticism of the indictment, appellant insists that it merely means that defendant published of and concerning Walker that he (Walker) was a Populist, and that he had no faith in the principles advocated by the Democratic party; and that the distinctive principles of the two parties (Populist and Democratic) should have been averred, in order that it might be seen whether or not it was disgraceful to entertain the views of a Populist and to eschew those of a Democrat. If the information in question contained no more than this, no doubt appellant's contention would be correct; but, when we read all the parts of the information, it affirmatively charges that the prosecutor, Walker, was a candidate of the Democratic party, and its nominee for the office of county clerk of Clay county; and that an election was then pending for said office; and that the People's party were then and there opposing the nominees of the Democratic party of Clay county, and were seeking to defeat their election, and especially were opposed to the election of the said Walker; and that said Walker, occupying the attitude of the nominee and candidate of the Democratic party for county clerk, wrote and caused to be sent out secretly a circular letter, marked "Confidential," of and concerning himself, to the effect that he was not in sympathy with the views of the party of which he was a candidate, but that he believed in the platform and principles enunciated by the People's party, whose support he was then secretly striving to procure—that is, we gather from the allegations here made that it was intended to charge that while Walker was openly posing as a Democrat, and availing himself of their support, he was at the same time, by a secret circular, undermining the party of which he was a candidate, and seeking the aid and support of the opposition, in a clandestine manner. Now, was this conduct dishonest as ¹⁰⁷ applied to a candidate for office? The language of the statute is that, in order for the matter to be slanderous as to the candidate for office, there must be an imputation that he

was dishonest, and therefore unworthy of such office. While, according to some definitions, "dishonesty," in its broader sense, might reach such conduct as was here attributed to the prosecutor, Walker, we do not believe the statute had reference to that character of dishonesty. But it means such want of honesty as would go to his personal integrity, and would render him unfit to be trusted with official duties. The mere fact that a person was unfaithful to the party whose nominee he may have been, or that, while he was the nominee of one party, he was secretly conniving with the other opposing party for its support, while it would suggest a want of such high moral principle as should actuate a party's standard bearer, yet it would not indicate a want of such personal honesty as would render him unworthy of holding an office.

Does the language and conduct stated by the circular, in contemplation of the statute, show that appellant imputed to the prosecutor, Walker, that he was guilty of an act disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons? We must confess that the answer to this question is fraught with some difficulty. In a general sense, it would certainly not be considered honorable to be a candidate of one party and secretly connive with the opposition for its support. Such conduct, even among politicians, would be regarded as disreputable, and justly so; but is it the sort of conduct characterized by the statute as an act disgraceful to the person so doing as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons? We can conceive of a vast number of acts that would tend to disgrace a man in the eyes of society, and the natural tendency of which would be to bring such person into contempt among honorable persons. A number of acts which we may imagine might be on the border line. In such case it would be difficult to determine whether or not they were within the purview of the statute. It is always a question for the court to say whether or not the particular act attributed is libelous or not. Our constitution provides: "In all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases": See Bill of Rights; Const., art. 1, sec. 8. And article 748 of the Penal Code of 1895 is to the following effect: "The jury, in every case of libel, are not only the judges of the facts and of the law, under the direction of the court, in accordance with the constitution, but they are

judges of the intent with which a libel may have been published or circulated, subject to the rules prescribed in this chapter; and, in rendering their verdict, they are to be governed by a consideration of the nature of the charge contained in the libel, the general reputation of the person said to be defamed, and the degree of malice exhibited by the defendant in the commission of the offense." These provisions, as we understand them, authorize the court to judge ¹⁰⁸ whether the particular matter charged comes within the definition of a libel under the statute, but in nowise curtail the functions of the jury as to the intent with which the libel may have been published. It will be borne in mind, as before stated, that the language—that is, the circular containing the libelous matter—is not equivalent to the mere declaration on the part of the appellant that Walker, the prosecutor, was a Populist. This language would not be libelous, but the indictment embracing the inducement and the circular in question contains far more than this. It contains the charge that the prosecutor, Walker, while ostensibly a Democrat and the nominee of the Democratic party, had written and signed a secret circular, and sent the same abroad to certain parties, abnegating a belief in the principles of the party whose cause he was openly espousing, and professing a belief in the Populist, the opposing party; thus treacherously seeking their support in his election. The indictment shows that, if said circular was true, he was acting the part of a hypocrite and a traitor; and certainly, in our opinion, if guilty of such conduct, it was calculated to bring him into disgrace and reproach among gentlemen, and should justly subject him to the contempt of all honorable persons; and we believe it was such an act as is within the contemplation of our statute on the subject. We hold that this charge in the indictment was a sufficient allegation of libel.

Appellant, by several bills of exception, objected to certain testimony. We believe that the testimony of Gorman and McWhorter was admissible. With reference to placing the witnesses under the rule, while this is a matter much in the discretion of the court, still, when the rule is invoked, unless some good reason is shown, all of the witnesses should be placed under the rule, and we see no good reason why the witness Walker should have been excused by the trial judge.

Appellant excepted to the charge of the court, and also asked a number of special charges which the court refused to give, and he reserved his bill of exceptions. These exceptions raised

several material questions. The court, in the general charge, only instructed the jury with reference to the allegation of the information predicated on the proposition that appellant attributed an act of dishonesty to the prosecutor, who was a candidate for office, that rendered him unworthy of holding said office. As we have seen, the information is not libelous as to this charge, but was only libelous on the proposition that it attributed to the prosecutor Walker an act disgraceful to him as a member of society, and the natural consequence of which was to bring him into contempt among honorable persons. This latter phase of the case was not given to the jury at all. Appellant's special charges, while not correct, called the court's attention to this matter, as charges were presented embracing both views. Evidently, the jury responded to the charge of the court, and found their verdict upon a charge not authorized by law, as we have held same was not libelous. The court should have instructed them to ignore or disregard that portion of the information, and should have simply instructed them on the other proposition, substantially to the effect ¹⁰⁰ that if they believed appellant made or published said circular under the circumstances stated in the information, and if they believed that, under such circumstances, the making or publication of said secret circular letter by defendant was of and concerning the prosecutor, and attributed to him an act disgraceful as a member of society, and the natural consequence of which was to bring him into contempt among honorable persons, they should find him guilty, and assess his punishment at a fine, etc. We do not undertake herein to lay down a precise form for a charge on this subject, but merely indicate in outline the character of charge which should be given.

For the error of the court in failing to properly instruct the jury, the judgment is reversed and the cause remanded.

LIBEL—INNUENDO.—THE OFFICE of an innuendo is to aver the meaning of the language published, to define the defamatory meaning the plaintiff put upon the words: Note to Bearce v. Bass, 51 Am. St. Rep. 454. An innuendo is unnecessary, and may be rejected as surplusage, where the writing on its face relates to the plaintiff, and the words are libelous in themselves: Adams v. Lawson, 17 Gratt. 250, 94 Am. Dec. 455.

LIBEL—IMPUTATION OF DISHONESTY—CHARGE OF DISGRACEFUL CONDUCT—CANDIDATES FOR OFFICE.—A libel, though true, is a public offense: Commonwealth v. Blanding, 3 Pick. 304, 15 Am. Dec. 214. A letter which intimates a suspicion of dishonesty may be a libel; and language which tends to injure the reputation of a party, to throw contumely, or to reflect shame and dis-

grace upon him, or to hold him up as an object of scorn, hate, ridicule, or contempt, is libelous: Note to Hollenbeck v. Hall, 64 Am. St. Rep. 177; State v. Brady, 44 Kan. 435, 21 Am. St. Rep. 296. Whatever imputes moral delinquency to a candidate for office is not privileged, but actionable per se: Note to Aldrich v. Press Printing Co., 86 Am. Dec. 88. False and defamatory publications concerning the acts or character of a candidate for office are not privileged and are actionable: See monographic note to McAllister v. Detroit Free Press Co., 15 Am. St. Rep. 355, 356, on newspaper libel. A newspaper proprietor is answerable for what he publishes in the same manner as any other individual: Note to Upton v. Hume, 41 Am. St. Rep. 874. Libel is an offense punishable, in some states, by indictment: State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

WITNESSES—SEQUESTRATION OF.—The exclusion of witnesses from the courtroom is discretionary with the court: *Sanders v. Johnson*, 6 Blackf. 50, 36 Am. Dec. 564.

SLAWSON v. STATE.

[39 TEXAS CRIMINAL REPORTS, 176.]

ASSAULT, AGGRAVATED—MEANS INFLECTING DISGRACE—CONSTRUCTION OF STATUTE.—If a statute defines an aggravated assault to be one where the means used are such as inflict disgrace upon the person assaulted, "as an assault and battery with a whip or cowhide," the naming of a whip or cowhide does not limit the character of the assault to those means, but the statute contemplates any other means which inflict disgrace.

ASSAULT, AGGRAVATED—MEANS INFLECTING DISGRACE—WHAT ARE INCLUDED.—Any means used in making an assault, the natural tendency of which is to disgrace the assaulted party, may be an aggravated assault under a statute which defines such an assault to be one where the "means used are such as inflict disgrace upon the person assaulted."

ASSAULT, AGGRAVATED—LASCIVIOUS CONDUCT.—If a male person pulls up the dress of a chaste female person, against her will and consent, with undue familiarity, and to the extent of forcibly feeling of her legs, body, and private parts, and inserting one of his fingers into her vagina, such treatment constitutes an aggravated assault, which inflicts disgrace upon the person assaulted.

DEFINITIONS.—"DISGRACE" means cause of shame or reproach; that which dishonors; a state of ignominy, dishonor, or shame.

ASSAULT, AGGRAVATED.—THE GRAVAMEN of the offense of aggravated assault, where the means used are such as to inflict disgrace upon the party assaulted, is the constraint or sense of shame.

INFORMATION—SUFFICIENCY OF, AS TO SHOWING OF SEX.—An information which charges that the defendant did commit an aggravated assault by means inflicting "disgrace" upon the person assaulted, naming her, and did "feel and fondle her legs, body, and vagina," and "did insert his finger" in her vagina shows the gender of the parties. The use of the pronoun "his" sufficiently

designates that the defendant was a male person, it not being necessary to allege that he was an adult male, and the reference to the prosecutrix as "her," as well as the reference to her vagina, sufficiently indicates that she was of the female sex.

Conviction for an aggravated assault upon a female person. It appeared from the testimony of the prosecutrix that she was nine years of age; that she was out one day with the defendant in a wagon, to show him the way to her brother's place, some sixteen miles from where she lived with her mother; that, on their return home, she went to sleep in the rear of the wagon on some corn; that she was awakened by Joe Slawson, the defendant, pulling up her dress and feeling of her legs; that she told him to quit, and commenced fighting him, telling him she would get out of the wagon if he did not stop; that he continued to feel of her legs, body, and vagina, and inserted his finger "in what she had," pointing to her vagina; that she was fighting him all the time he was feeling of her; that after a while, Joe said: "Will you swear that you will not tell what I have done"; that she replied: "I am going to tell mamma as soon as I get home"; that Joe then said: "I will stamp you to death if you ever tell"; that he again asked her if she would promise not to tell; that she replied: "I will swear that I will not tell"; that she did not tell for about a month, for the reason that she was afraid of Joe; and that the defendant was her brother in law, and was twenty years of age.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

178 HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of three hundred dollars, and imprisonment in the county jail for twelve months; hence this appeal.

The only question necessary to be considered in order to make a proper disposition of this case is as to the validity of the information. The charging part of the same is as follows: That said J. J. Slawson "then and there unlawfully in and upon Ida Altman did commit an aggravated assault and battery, by means which inflict, and did inflict, disgrace upon the said Ida Altman, to wit, the said J. J. Slawson did then and there pull up the dress of the said Ida Altman, and did then and there, against her (the said Ida Altman) will, feel and fondle her legs, body, and vagina, and did insert his (the said J. J. Slawson) finger, in the said Ida Altman's vagina," etc. Now,

it is objected to this information that it does not charge the offense of an aggravated assault, under the statutes of this state, and that it does not allege that appellant was a male person, or that Ida Altman was a female. We would observe that this information is not brought under subdivision 5, article 601, of the Penal Code, which makes an assault by an adult male upon the person of a female or child, etc., an aggravated assault; but the attempt of the pleader was to charge the appellant with an aggravated assault under subdivision 6 of said article. Said subdivision reads as follows: "When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault and battery with a whip or cowhide." So the question presented to us is whether the means here charged is such as inflicts disgrace upon the alleged assaulted party. We do not understand the subdivision in question, by naming a whip or cowhide, to limit an assault made by the character of instruments named. These are merely illustrative. We hold that any means used in making an assault, the natural tendency of which is to disgrace the assaulted party, may be an aggravated assault, under said subdivision. Assuming, then, that the information sufficiently charges that the act was committed by a male person upon a female person, as set out in the indictment, would the natural tendency of such acts and conduct on the part of the accused inflict, or tend to inflict, disgrace upon the alleged injured party? The gravamen of this character of offense (that is, the injury inflicted) is constraint—a sense of shame. The statute makes it so, and the cases are numerous in support of this proposition. "Disgrace" is defined to be "a cause of shame or reproach; that which dishonors; a state of ignominy, dishonor, or shame": See Century Dictionary; Webster's Dictionary. To our minds, unquestionably, the act of a male person treating a chaste female person, against her will and consent, with undue familiarity, and to the extent of forcibly feeling of her private parts, would cause her to feel a keen sense of shame and dishonor. We can conceive of no act which would cause such a female a greater sense of mortification than such conduct. To be compelled to submit to such treatment would tend to degrade her, and, if known, to bring her into disgrace. A number of cases might be cited in which convictions for aggravated assaults have been sustained under ¹⁷⁹ an indictment for an assault with an intent to rape. The allegations in such indictments do not bring them under subdivision 5, and they have been

sustained only under subdivision 6, because the assault was of a character calculated to inflict disgrace upon the assaulted party: See *Curry v. State*, 4 Tex. Cr. App. 574; *Brown v. State*, 7 Tex. Cr. App. 569; *George v. State*, 11 Tex. Cr. App. 95; *Pefferling v. State*, 40 Tex. 486.

The remaining question is, Does the information sufficiently show that appellant was a male person, and that the prosecutrix was a female? It is not distinctly alleged in the information that appellant was a male, but it is alleged that the said J. J. Slawson did "feel and fondle her legs, body, and vagina, and did insert his finger in the said Ida Altman's vagina." The use of the pronoun "his," it occurs to us, is a sufficient designation that he was a male person. It will be borne in mind that it is not necessary, under subdivision 6, to allege that he was an adult male. So, we take it, the same particularity of pleading is not required under this subdivision as under subdivision 5. It also occurs to us that the expressions here used are a sufficient designation of the gender of the assaulted party. She is repeatedly referred to as "her," and the reference to her vagina sufficiently indicates that she was of the female sex. We accordingly hold that the indictment sufficiently charged appellant with an aggravated assault, and the judgment is affirmed.

AGGRAVATED ASSAULT—INJURY INTENDED.—On a trial for aggravated assault by an adult male upon a female child about eight years of age, by holding her between his legs with his privates exposed, and making indecent proposals to her, while she attempted to get away, and entreated him to let her go, it must be shown that the defendant intended to injure the prosecutrix, but such intent is shown by proof either of bodily pain, constraint, sense of shame, or other disagreeable emotion of the mind: *Hill v. State*, 37 Tex. Cr. Rep. 279, 66 Am. St. Rep. 803.

CLARK v. STATE.

[39 TEXAS CRIMINAL REPORTS, 179.]

INCEST—NECESSITY OF INSTRUCTION AS TO TESTIMONY OF ACCOMPLICE.—If it appears upon the trial of an indictment containing a count for incest and two counts for rape that the prosecutrix is the principal, if not the only, witness for the state as to the act of carnal intercourse; that she is the state's main witness as to her paternity; that she copulated with the defendant, who was her father; but that the act of carnal intercourse was with her consent, it is error for the court not to instruct the jury on accomplice testimony.

INCEST—NECESSITY FOR CORROBORATION AS TO TESTIMONY OF PROSECUTRIX.—An isolated act of copulation, testified to solely by the prosecutrix, on a trial for incest, will not support a conviction; and her statements to another person, on the next day, telling of the incestuous act, are not admissible to corroborate her.

INCEST—ILLEGITIMATE RELATIVES.—The crime of incest can be committed between illegitimate relatives within the prohibited degree.

INCEST—EVIDENCE—RELATIONSHIP.—The evidence as to the relationship of the parties, on a trial for incest, should be clear and unequivocal.

TRIAL—CONTINUANCE, WHEN PROPER—ABSENT WITNESSES.—It is error to overrule an application for a continuance on the ground that a witness is absent, where it appears that the testimony of the absent witness is material, and that due diligence has been used to secure his attendance.

Conviction for incest. All of the counts in the indictment related to one act. It appeared from the testimony of the prosecuting witness, Mattie Clark, that the defendant, Tom Clark, used her as his wife, against her consent, about half-past 12 o'clock at night, on December 12, 1897; that he threw her down upon a bed and raped her; that there was but one bed in the room; that her brother Harry was in the room, and that another brother and two little sisters were in the same house. She was the only witness to testify to these facts. She also testified that she was the daughter of the defendant and was fourteen years old. There was evidence that the prosecutrix was the illegitimate daughter of the defendant. The defendant testified that he stayed with one Josephine Brown on the night of the alleged crime, but a witness, Ellen Burton, testified that he did not stay there. The testimony of Susie Clark, who was in the house on the Saturday night of the alleged crime, was, that she heard nothing, and that the defendant whipped the prosecutrix, on the next Sunday morning, for running around at night. The defendant was first arrested on a charge of rape,

and, after being put under a bond, was rearrested the next day upon a charge of incest. The state abandoned the first count in the indictment, which alleged the age of the prosecuting witness to be under fifteen years, as the proof and her appearance showed conclusively that she was over fifteen years of age. The testimony of the prosecutrix was not corroborated, and there was no proof whatever of penetration, or that the defendant had had carnal intercourse with her, other than that stated in her testimony. When the case was called for trial the defendant applied for a continuance for the reason that a material witness, Josephine Brown, was absent, but the application was denied.

Clark, Guinn & Guinn, for the appellant.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

181 HENDERSON, J. Appellant was convicted of incest, and his punishment assessed at seven years confinement in the penitentiary; hence this appeal.

The indictment contained three counts—the first for rape on a girl under fifteen years of age; the second, rape committed on a woman by force; and the third, a count for incest, the same alleging that the party with whom the incest was committed was the daughter of the appellant. In submitting the case to the jury the court eliminated the first count, and instructed the jury on the second count (rape committed on a woman by force), and on the third count (incest). The jury acquitted appellant of the charge of rape, and found him guilty of incest on the last count.

Appellant contends that the court erred in failing to instruct the jury on accomplice testimony. So far as the act of carnal intercourse is concerned, the prosecutrix was the principal, if not the only, witness for the **182** state; and as to her paternity she was also the state's main witness. The jury acquitted appellant of rape, and therefore of the force necessary to constitute rape. They found that she had copulated with appellant, and that he was her father. They evidently found that such act of carnal intercourse was with her consent. Under this state of case, the court should have given a charge on accomplice testimony: See *Watson v. State*, 9 Tex. Cr. App. 237; *Freeman v. State*, 11 Tex. Cr. App. 92, 40 Am. Rep. 487; *Mercer v. State*, 17 Tex. Cr. App. 452; *Stewart v. State*, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 35.

Appellant also insists that the testimony of the prosecutrix is not corroborated, and that, consequently, the verdict cannot be sustained. We believe he is correct in this contention. The proof showed, on the part of the state, an isolated act of copulation, testified to solely by the prosecutrix, and we fail to find in the record any corroboration of her testimony as to this matter. The fact that she may have told another witness of the occurrence on the next day, in the first place, was not legitimate testimony on a count for incest, and consequently it was not the testimony of another witness to some fact in the case tending to corroborate her, and to connect appellant with the commission of the offense for which he was convicted. Appellant could not have objected to the admission of her statements, because they were admissible under the count for rape, but inadmissible in support of her on the count for incest.

Appellant also insists that the proof is not sufficient to show that the prosecutrix was his daughter. There is testimony in the record tending to show that she was his illegitimate daughter. The authorities hold that the crime of incest can be committed between illegitimate relations within the prohibited degree: See 2 McClain's Criminal Law, sec. 1120, and authorities cited in note. The proof here made, however, is by no means satisfactory. And we hold in such case that the evidence should be clear and unequivocal as to the fact of relationship.

We also believe that the court erred in overruling appellant's application for a continuance, under the peculiar facts of this case. It appears that the evidence of Josephine Brown is material, and that he used due diligence to procure her attendance. Her evidence was made the more necessary by the state introducing Ellen Burton as a witness.

For the errors pointed out, the judgment is reversed and the cause remanded.

INCEST—WOMAN AS AN ACCOMPLICE—NECESSITY OF CORROBORATION.—If, on a trial for incest, the evidence tends to show that the prosecuting witness consented to the commission of the offense charged, she should be treated as an accomplice; and the jury should be instructed that, before they can convict, her testimony must be corroborated: *Stewart v. State*, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 35; *Freeman v. State*, 11 Tex. App. 92, 40 Am. Rep. 787; and see, also, *State v. Jarvis*, 20 Or. 437, 23 Am. St. Rep. 141. A witness cannot be corroborated by proof of his previous statements to the same effect: *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169.

INCEST—ILLEGITIMATE RELATIVES.—Incest may be committed with one's illegitimate child: *People v. Lake*, 110 N. Y. 61, 6 Am. St. Rep. 344.

INCEST—EVIDENCE.—REPUTATION is sufficient evidence of relationship between the parties, on an indictment for incest: *Ewell v. State*, 6 Yerg. 364, 27 Am. Dec. 480.

NEW TRIAL—CONTINUANCE.—THE MERE ABSENCE OF WITNESSES is not good cause for a new trial, unless it was made the ground of an application for a continuance, or a valid excuse is given for not making such application: *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181. An application for a continuance on account of the absence of a witness should be overruled unless it shows diligence to secure his attendance and that his testimony would probably be true: *Miller v. State*, 31 Tex. Cr. Rep. 609, 37 Am. St. Rep. 836; *Reyons v. State*, 33 Tex. Cr. Rep. 143, 47 Am. St. Rep. 25. But improperly overruling a motion for a continuance is good ground for a new trial: *Kent v. Lawson*, 12 Ind. 675, 74 Am. Dec. 233; and it is error, in a criminal case, to overrule an application for a continuance to procure the presence of a material witness for the accused: *State v. Williams*, 18 Wash. 47, 63 Am. St. Rep. 869; *Ryder v. State*, 100 Ga. 528, 62 Am. St. Rep. 334; *Long v. State*, 39 Tex. Cr. Rep. 461, post, p. 954.

HOLMES v. STATE.

[39 TEXAS CRIMINAL REPORTS, 231.]

CRIMINAL LAW—DISTURBING RELIGIOUS WORSHIP. EVIDENCE that a person was at a church door, cursing and swearing there with others, and disturbing the congregation therein assembled to the extent of breaking it up, is sufficient to support a conviction for the willful disturbance of religious worship, where the congregation were then and there conducting themselves in a lawful manner during the performance of services.

CRIMINAL LAW—DISTURBING RELIGIOUS WORSHIP. AN INSTRUCTION, on the trial of a mere misdemeanor, such as willfully disturbing a congregation assembled for religious worship, which defines the word "willful" to mean "with evil intent, or without reasonable grounds for believing the act to be lawful," is sufficient without including the expression "legal malice" in the definition.

Conviction for willfully disturbing a congregation assembled for religious worship.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

231 DAVIDSON, J. Appellant was convicted of willfully disturbing a congregation, who were then and there conducting themselves in a lawful manner, and his punishment assessed at a fine of twenty-five dollars; hence this appeal.

The first three assignments of error refer to the sufficiency of the evidence to support the judgment. There is some con-

tradiction or conflict in the evidence as to the exact place of the disturbance; that is, whether it was in the church, at the door of the church, or en route from the church to a school-house a few steps away. The testimony of Morris Martin is to the effect that Archie Smith, Horace Holmes, Theodore Holmes, and himself began quarreling at the church door, and that all of them cursed, and thence they went to the school-house, about fifty yards off, and renewed the swearing and disturbance. Felix Powell's testimony discloses that he was at the church at the time of the disturbance, and went to the boys while they were quarreling, and heard the defendant curse, and say, "God damn it, I am a change for him"; that there was a congregation assembled at the time, and services were being conducted, and that the congregation were conducting themselves in a lawful manner. Will Smith testified that Oscar Sanford spoke to him in church, and told him to go out and stop the noise at the church door; that he went out and told the boys not to row there; that they went off to the schoolhouse, and everybody jumped up and went out there, and everybody got to cursing. So it would seem from the testimony that Theodore Holmes, the defendant, was at the church door, and was cursing ²³² there, which disturbed the congregation to the extent of breaking it up. So we think the testimony is sufficient.

It is contended that the definition of "willful" in the court's charge is not sufficient. The language of the charge in this respect is as follows: "'Willful,' in the sense as above used, means with evil intent, or without reasonable grounds for believing the act to be lawful." As a ground of his motion for a new trial, appellant contends that the expression "legal malice" should have been included in this definition; hence this omission is fatal. We do not think so. The definition of "willful," as given by the court, is sufficient: See *Thomas v. State*, 14 Tex. Cr. App. 200; *Wood v. State*, 16 Tex. Cr. App. 574; *Finney v. State*, 29 Tex. Cr. App. 184. We would observe that this is a misdemeanor. No charge was asked by appellant covering the supposed defect, and there was no exception reserved to the charge as given. But, had these necessary steps been taken, we would still be of the opinion that the definition is sufficient.

The judgment is affirmed.

CRIMINAL LAW—DISTURBANCE OF RELIGIOUS WORSHIP—WHAT IS.—Disturbing any member of a congregation assembled for religious worship is a disturbance of religious wor-

ship: *State v. Wright*, 41 Ark. 410, 48 Am. Rep. 43. It is not necessary that the assemblage should be actually engaged in worship at the moment: *Lancaster v. State*, 53 Ala. 398, 25 Am. Rep. 625.

CLEMMONS v. STATE.

[39 TEXAS CRIMINAL REPORTS, 279.]

LARCENY—THEFT FROM THE PERSON—WHAT IS. The offense of theft from the person is complete where the property, such as money, is suddenly snatched from the hands of the owner, with intent to deprive him of its value, and reduced to possession, before he has time to make resistance, though he may have seen the perpetrator and have known of his act at the time of its commission.

LARCENY—THEFT FROM THE PERSON—MANNER AND PLACE OF TAKING.—A statute requiring that property shall be "privately" taken to constitute the offense of theft from the person refers to the manner of taking from the person, and not to the place at which the property was taken. Hence, such offense can be committed in a public place by snatching property, such as money, from the hands of the owner, without his consent, and with intent to deprive him of its value, and so suddenly as not to allow him time for resistance.

LARCENY—THEFT FROM THE PERSON—ASPORTATION.—It is not necessary that property stolen from the hands of a person should be carried away from the presence of the owner to constitute the offense of theft from the person. It is only required that the property stolen should have gone into the possession of the thief with intent to deprive the owner of its value.

WITNESSES—IMPEACHMENT.—THE CREDIBILITY of a defendant witness may be attacked, on cross-examination, by eliciting from him the fact that he has been convicted of a felony, whether he has been pardoned or not.

APPEAL—SUPPLYING OBJECTIONS.—A court, on appeal, will not supply a defect in the bill of exceptions, or supply grounds of objection.

B. B. Beaird, for the appellant.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

280 DAVIDSON, J. Appellant was convicted of theft from the person, and his punishment assessed at confinement in the penitentiary for a term of four years; hence this appeal.

The evidence discloses that at Wes Larkin's barbershop, in the town of Tyler, Lampkin, the prosecutor (Sanders), George Francis, and Amos Ewing were in conversation when the defendant walked up. Sanders, the alleged owner, remarked that he was going to Dallas, and defendant said, "You have got no

money; you will have a long walk," or something to that effect. Sanders drew from his pocket twenty-five dollars, consisting of two ten dollar bills and one five dollar bill, and displayed it, with the remark that "a man don't walk when he's got stuff like this." Defendant immediately snatched the money from the hand of the owner, and so quickly and suddenly as not to allow Sanders an opportunity to prevent him from doing so. Defendant backed away a step or two, Sanders demanding his money. Defendant handed him one ten dollar bill, and, after being urged to return the balance, handed Sanders the five dollar bill; retaining the other ten dollar bill, and denying having it, asserting that he had only twenty cents, and displaying the twenty cents. He left, and went into a house near by, being followed by the crowd; and Sanders again demanded the money. Appellant again denied having the money, and continued denying it until the officer arrived and searched him, and took the ten dollar bill from him, and returned it to the owner.

The court charged the jury appropriately with reference to taking the money so suddenly as not to allow time for resistance. The defendant, however, asked a charge to the effect that, if the defendant did take the money so suddenly as not to allow time to make resistance before the property was carried away, they should find the defendant not guilty, even though it was fraudulently taken, provided the money was taken with the knowledge of Sanders at the time it was taken, and further, in the same connection, that the law did not define what would be time sufficient for such resistance, but it was a matter of fact, to be determined by the facts detailed in evidence. The court very properly refused to give this charge. It is not necessary that the property be carried away; the law only provides that it shall be taken; and if taken so suddenly as not to allow time for resistance, and reduced to possession, the offense is complete, so far as this phase of the case is concerned. The resistance spoken of in the statute refers to the time preceding the reduction ²⁸¹ to possession by the taker, and not subsequent to such reduction. It would be difficult to imagine a more sudden taking than that disclosed by the evidence in this case. The owner was holding the money in his hand, and the defendant jerked it from his hand. How there could have been any time for resistance, under this state of facts, we are unable to comprehend. The charge asked was not the law of this case.

The court charged the jury that it is not sufficient for the

state to show that defendant stole the money, but the evidence must establish, beyond a reasonable doubt, that the defendant privately stole said money from the person and possession of B. M. Sanders, without his consent, and so suddenly as not to allow the said B. M. Sanders to make resistance before the defendant carried said property from the person and possession of Sanders; otherwise to acquit. This charge was objected to because it is a suggestion to the jury that there was evidence authorizing the jury to believe that the offense was committed privately, when in fact there is evidence to show that it was not privately done; that it was publicly taken. The theory of this objection seems to be that if money is snatched from the person of the owner, in a public place, the offense of privately stealing from the person could not be sustained. This view would be a direct subversion of the statute. The statute has reference to the manner of taking from the person, and not the place where taken.

Appellant also objects to the court's definition of "carrying away," wherein he instructed the jury that he did not mean that the taker should carry the property from the presence of the owner, but if the jury believe that the money was reduced to complete possession, with intent to deprive the owner of its value, then the law would deem it to have been carried away. Subdivision 3, article 880, of the Penal Code, is in the following language: "It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to accomplish the offense." The court's charge was sufficient, under this subdivision of the statute.

Appellant took the stand in his own behalf, and testified, on the trial. On cross-examination, the district attorney asked him the following question: "Sonnie, haven't you once before been convicted and sent to the penitentiary?" Appellant objected. The district attorney then changed the form of his question: "Sonnie, haven't you been in the penitentiary?" Appellant objected, without stating any grounds. The court sustained the objection, however, and in doing so remarked, "Mr. Smith, if you desire to go into that, you can do so; but I give you notice now that, if you go into it, you will do so at your own peril." Mr. Smith, the district attorney, replied, "Well, sir, I will not, then, insist upon it." This ended the incident. The bill recites that the defendant at the time excepted to the questions and remarks of the district attorney and of the court. The court qualifies the bill by stating that he sustained the ob-

jection of the defendant to the question, and instructed the jury to disregard the question, and the entire incident connected with it. It is not the province of this court to supply a defect in the bill of exception, nor supply grounds ²⁸² of objection. But we are at a loss to know upon what theory the objection would be based. Appellant, although he may have been in the penitentiary, and unpardoned, has a right to testify in his own behalf. This is well settled. For the purpose of impeaching his testimony or attacking his credibility, the fact can be elicited from the defendant himself, on cross-examination, that he has been convicted of a felony; and this, whether he had been pardoned or not. The defendant could not be debarred the privilege of testifying in his own behalf, although he was an unpardoned convict, even had the record of his conviction and sentence been produced. But it is evident from the bill of exceptions that the state was not seeking to render him incompetent to testify, but the question was directed to his credibility. The bill does not show that the witness answered, or what his answer would have been. It might have been in the negative. The remark of the court was not a comment upon the testimony, nor did it intimate any view the court may have had upon any testimony in the case.

The contention of appellant that the evidence is insufficient is without merit. That he snatched the money from the hands of the owner so suddenly as not to allow time for resistance is amply sustained by the record. He claims to have gotten twenty-seven dollars and fifty cents the same morning from his mother, with which to pay a fine assessed against him in an adjoining county. Concede this to be true; still that would not justify him in taking the money from Sanders.

The judgment is affirmed.

Hurt, presiding judge, absent.

LARCENY FROM THE PERSON—ASPORTATION.—An instantaneous caption and asportation is sufficient to constitute the crime of larceny from the person: *Commonwealth v. Luckis*, 99 Mass. 431, 96 Am. Dec. 769; *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517. See, also, *State v. Seagler*, 1 Rich. 30, 42 Am. Dec. 404. Thus, if a thief attempts to steal a pocket-book from the pocket of a person, he must, for an instant at least, have had perfect control of the property in order for his act to constitute larceny; though it is not necessary for the pocket-book to be removed from the pocket, if once within the grasp of the thief, to constitute larceny: *Commonwealth v. Luckis*, 99 Mass. 431, 96 Am. Dec. 769. Lifting a pocket-book partly from the pocket of another person, with intent to steal it, is "taking and carrying away," although it is not removed from the pocket: *State v. Chambers*, 22 W. Va. 779, 46

Am. Rep. 550; *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517. In Texas, the necessity of asportation has been done away with by statute, and in that state, now, larceny may be complete without any asportation: See monographic note to *State v. Homes*, 57 Am. Dec. 272, on larceny.

WITNESSES—IMPEACHMENT—CONVICTION OF FELONY.—Under section 2051 of the California Code of Civil Procedure, a witness may be impeached by asking him if he has been convicted of a felony: See monographic note to *Allen v. State*, 73 Am. Dec. 776, discussing the practice upon impeaching witnesses.

GARZA v. STATE.

[89 TEXAS CRIMINAL REPORTS, 358.]

HOMICIDE—MURDER—IRREGULAR VERDICT—EFFECT OF.—If a jury, in a murder case, where the indictment charges murder in the first degree, find the defendant guilty as charged, without stating the degree of murder, as required by the statute, the verdict is irregular and erroneous, but not void, and, though it is ground for a reversal of the case and a new trial, it does not acquit the defendant of murder in the first degree.

FORMER JEOPARDY—PLEA OF, WHEN NOT MAINTAINABLE, WHERE VERDICT FOR MURDER FAILS TO STATE DEGREE.—If the jury, in a murder case, where the indictment charges murder in the first degree, find the defendant guilty as charged, but fail to state the degree of murder, as required by the statute, and a new trial is granted, presumably because of such defect in the verdict, the defendant cannot maintain a plea of former jeopardy, on the ground that such verdict operated as an acquittal.

HOMICIDE—MURDER—EVIDENCE OF DEFENDANT'S IMPECUNIOSITY.—It is competent for the prosecution, on a trial for murder committed in the perpetration of a robbery, to prove that the defendant, before the homicide, was in an impecunious condition, but that he afterward had money.

HOMICIDE—MURDER FOR PURPOSE OF ROBBERY—INSTRUCTIONS.—It is correct to charge the jury, in a murder case, that the killing was murder in the first degree, where the motive for the homicide was robbery.

NEW TRIAL—CONTINUANCE—ABSENT WITNESSES.—A motion for a new trial upon the ground that the court erred in overruling a motion for a continuance, predicated on the absence of a material witness, should be overruled where there was a manifest want of diligence in procuring the attendance of the witness, particularly if it further appears that his testimony, if he were present, would not be true, and that it would not probably change the result upon another trial.

Conviction for murder in the first degree. The appellant was charged in the indictment with the murder of an unknown person, in Webb county, on or about April 11, 1897. A preceding trial had resulted in a conviction, with punishment assessed

at imprisonment in the penitentiary for life; but a new trial had been granted because the verdict did not find the degree of murder; and, upon the trial from which this appeal was prosecuted, the defendant pleaded former jeopardy, based upon the prior verdict.

A. Winslow, for the appellant.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

³⁶⁰ HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death, and prosecutes this appeal.

Appellant presented what he terms a plea of former jeopardy, and we find in the record the proceedings of a former trial of this case at a ³⁶¹ former term of the district court of Webb county. No action appears to have been taken or invoked on this plea. It is insisted, however, that the trial court must take cognizance of proceedings had in the same case, and that it was bound to take judicial cognizance of the former trial, and what was done thereat; and it is urged that because the jury had rendered the following verdict at the former trial, to wit: "We, the jury in the above-named cause, find the defendant, Valentine Garza, guilty as charged in the indictment, and assess his punishment at confinement in the state penitentiary for life. Geo. H. Lanham, Foreman"—that same was, in effect, an acquittal of the defendant of murder in the first degree, and that he could not again be put on trial for said offense; and, in fact, it is insisted here that appellant cannot be put on trial for any offense, because said verdict was void, and the effect was to completely acquit appellant of any offense. As a part of the proceeding of said former trial, a motion for a new trial is found in the record, which was granted. Among various grounds assigned why the court should grant a new trial, is: "6. Because the verdict of the jury is contrary to law, in this: it fails to find of what degree—whether of the first or second degree." It has been repeatedly held by this court that a verdict of this kind is erroneous, and that, if a new trial is not granted by the court below, this court will reverse the judgment; the effect of such holding being that the statute requires the jury, whenever they find a defendant guilty of murder, to find of what degree—whether of the first or second degree—and that the failure to do this is an irregularity which requires a re-

versal of the case. But such holding is not based on the ground that the verdict is absolutely void, though such expressions may have been used in some of the cases, but the same was not necessary. The verdict in this case cannot be construed into an acquittal of murder in the first degree. It is merely an irregular verdict, finding appellant guilty of murder in the first degree. The indictment here charges appellant to be guilty of murder in the first degree, and embraces all inferior grades of felonious homicide. The verdict of the jury finding the defendant guilty as charged in the indictment certainly responds to the allegations in the indictment, because murder of the first degree is the charge in the indictment, and the assessment of the punishment only responds to that degree of murder. The jury failed to state the degree, as required by the statute, and this was the only irregularity in their verdict. This would be cause for a reversal of the case, but it by no means follows on that account that it is void. We hold that the verdict in this case did not acquit defendant of murder in the first degree. If so, unquestionably it would not have been within the power of the court to have again placed him on trial for that offense; but, being an irregular verdict for murder in the first degree, and a new trial having been granted defendant, doubtless because of the defect in the verdict, he cannot set up said proceedings as an acquittal of murder in the first degree, and so maintain his plea of former jeopardy: See *Du Bose v. State*, 13 Tex. Cr. App. 419; *Robinson v. State*, 23 Tex. Cr. App. 315. The cases of *Powell v. State*, 17 Tex. Cr. 362 App. 345, *Robinson v. State*, 21 Tex. Cr. App. 160, and *Foster v. State*, 25 Tex. Cr. App. 543, have no application to the question here under discussion.

Appellant insists that the court committed an error against him in admitting the testimony of the sheriff to the effect that, after appellant's arrest, and before he placed him in jail, he searched him, and found three ten dollar bills, Mexican currency, in one of his pockets. Said testimony was objected to on the following grounds: "Because there was no evidence showing that the deceased ever had the money in question, or any money, at the time of the homicide; and because said testimony was irrelevant, and did not in the least tend to connect appellant with the crime charged; and because it was calculated to prejudice the rights of the appellant before the jury." If it be true that deceased was not shown to have had any money, and appellant is shown to have been possessed of money, it occurs

to us that this testimony would be quite favorable to appellant. This would appear to dispose of his objection. However, there was testimony tending to show the impecunious condition of appellant at the time of the homicide. There was testimony which showed that he robbed deceased of his clothing. True, there was no testimony showing that deceased had the money in question on his person when he was killed. He was a stranger in that country. He only arrived at appellant's the evening before; was permitted to sleep at his camp; was found murdered the next morning; so that, in the nature of the case, it was impossible to tell whether he was possessed of any money or not; but the fact that the motive for the homicide on the part of appellant was robbery, and the testimony tending to show that he had no money prior to the homicide, we think it was competent to show that after the homicide he was found in possession of money.

Appellant also urges as error the charge of the court which instructed the jury to the effect that, if they found that the homicide was committed on a motive of robbery, it would be murder in the first degree. This is in accord with the authorities in this state on the subject. Appellant requested a number of charges, but, in our opinion, none of the same were called for.

Appellant also urges in his motion for a new trial that the court committed an error in overruling his motion for a continuance, predicated on the absence of one Concepcion Garza, whom he alleges was a material witness on his behalf. The diligence shown by him for this witness was not sufficient. This witness at a previous term had been placed under recognizance. On the 7th of October it appears that a forfeiture was taken of the recognizance, and an attachment issued for said witness to Webb county, the same being made returnable on the 23d of October, but was not returned until the 25th of said month, the sheriff stating thereon that after due diligence and search said witness could not be found; that she was not a resident of Webb county. This case was not called for trial until the 18th of November thereafter, so that appellant permitted nearly a month to elapse between the return of process for this witness on the ³⁶³ 25th of October until the trial of the case, and he used no diligence whatever to procure the attendance of said witness. However, it does not occur to us that, if said witness had been present, and had testified, it would have affected the result reached in this case. It is alleged that

said witness would testify that the clothes which the defendant had in his possession and on his body at the time he was arrested were the clothes of the defendant, and not the clothes of deceased; that said witness had washed and mended said clothing for the defendant prior to the time of the killing alleged in the indictment in this case; and that said witness had also made the sack or wallet for the defendant which was found in his possession at the time of his arrest, and which sack or wallet is claimed by the state to have been taken from the deceased by the defendant at the time of the homicide. In order to test the materiality of this evidence, we will state substantially the evidence on which the state relied for a conviction. Deceased, who was a Mexican, and whose name was unknown, was an utter stranger in that community. He came to the Garcia ranch, where appellant lived, being in charge of a goat herd, late on the evening prior to the homicide. He stated that he was from the interior of the state, and on his way to Mexico; that he was tired and sick, and wanted a place to stop, and rest over night. Manuel Castro, who seems to have had general supervision of the ranch, and to whom deceased made application, told him that he could stop, and expected deceased to go with him and stay all night, but was subsequently informed by him that he had made arrangements with the defendant, whose camp was about a half mile from Castro's. The general appearance and clothing of deceased were noted on that evening by several witnesses. He had on a brown cotton jeans coat and pants, and a new pair of brogan shoes, and carried a wallet, apparently filled with clothing. Deceased went from the water tank, where he met the parties, with appellant, to his camp, for the purpose of spending the night. The next morning, early, some of the employés of the ranch went to the camp of appellant, and there found the dead body of the strange Mexican. His coat and pants and shoes and the bundle he carried were gone. He was lying stark dead with his drawers and undershirt on. His head was crushed, evidently with some heavy instrument, and a stick of wood or club was found near the body, upon which was found blood and brains. Appellant was not on the place, and could not be found. The record shows that he had been in the employ of Garcia on the ranch as a goat herder for about ten days. The goats, at the time the parties came to that camp, had not been turned out of their pens. Appellant was shown to have been dressed rather roughly when he came to the ranch about ten days before. He brought only the suit he wore, and wore a pair of sandals. While at the

ranch he appears to have traded these for a pair of worn-down shoes that had peculiar tacks in the bottom. After the dead body was discovered, and the flight of appellant ascertained, immediate search was made for him. Tracks, evidently made by the shoes worn by him, were followed from the place of the homicide to the track of the International & Great ³⁶⁴ Northern Railroad, about a half mile distant. There tracks were then followed down the railroad in the direction of Laredo (which was about twenty-five miles from Webb station) for about fifteen miles, where they appeared to leave the road, and could not be followed further. Appellant is shown to have stopped at the house of one Sanchez, who lived about three miles below Laredo, on the night of the 11th of April—the homicide having been committed on the night of the 10th of April. He came afoot, and applied to Sanchez for permission to stay all night, stating that he had come from Green station, where he had been employed cutting corn. He had a wallet of clothing with him. He appeared to be nervous, and left this place about 7 or 8 o'clock the next morning, going in the direction of the Rio Grande river. He told Sanchez that he was traveling. Chacon states that he lived about seven miles from Laredo, down the river, and that about 10 o'clock on the morning of the 12th of April he met the defendant in the woods, and asked him where he was from, and he stated from Corpus Christi; that he was then going in the direction of the river, and asked witness if there was a skiff on the river. Witness directed him to the ranch of Luis Marulanda, and told him that he could probably cross the river there. Marulanda stated that his ranch was about seven miles below Laredo on the river; that appellant came to his house on the 12th of April, and asked him to take him across the river. Witness asked him where he was from, and he said from San Ignacio, in Zapata county; that the defendant had a wallet and a gourd; that the boatman took appellant across the river to the Mexican side; that shortly afterward (presumably on the same day) appellant returned from the Mexican side, and came back to the ranch of Marulanda. He was arrested at this point on the same day by the constable. When found he had the wallet of clothing and shoes, which were identified as the clothing of deceased. He also had his old clothes, and was wearing the shoes he had worn at the ranch, which had tack-heads protruding and turned-over heels. This was in the main all the testimony adduced against appellant.

In the light of this testimony, was the evidence of the absent

witness material? Now, in regard to the testimony of the absent witness, Concepcion Garza, we would observe that it is proposed to prove by her that she knew the clothes proven by the state to be those of deceased to be appellant's clothes, because she had washed and mended them. It is not stated in the application where this witness lived. But assuming that she lived near the ranch of Garcia and near the camp of appellant, where the homicide was committed, it would appear that she only had ten days within which to have washed and mended the clothing of appellant, for he had only been in that part of the country that length of time. The application, to have been a good one, should have stated when and where and under what circumstances she washed and mended that clothing. This it does not do. Moreover, it was very easy for appellant to have shown that the clothing produced in court had been mended and patched, ³⁶⁵ and had been washed recently. This was not attempted to be shown. Nor does this witness attempt to account for the brogan shoes found in possession of appellant, and which were shown to have been the property of deceased. It is remarkable, if appellant had clothes similar to those worn by deceased, that he was not able to make proof of this fact by some of the numerous witnesses who lived on that ranch. And it is singular, too, that the strange Mexican, who had on the evening before worn such a suit of clothes, should have been found dead the next day at the camp of appellant, only in his undershirt and drawers, his upper garments and his shoes gone, and also his wallet, and that appellant was found to be absent from camp—a thing that had not happened before—and to have been caught on the second day afterward, some twenty-five or thirty miles distant, having in his possession clothing and shoes which answered the description of those belonging to the deceased, and which were identified by a number of witnesses as articles worn by him prior to the homicide. In the light of this testimony we are constrained to believe that, if the witness had been present and had sworn to the facts stated in the application, no honest jury could have regarded her testimony as probably true, and that it would not in the least have affected their verdict. We have examined the record carefully, and in our opinion it contains no error requiring a reversal of this case, and the judgment is accordingly affirmed.

Hurt, presiding judge, absent.

HOMICIDE — IRREGULAR VERDICTS — EFFECT OF.—Generally speaking, a verdict in a criminal case, finding the defendant

guilty as charged is, in effect, a finding that he is guilty of every matter alleged against him in the indictment: *In re Black*, 52 Kan. 64, 39 Am. St. Rep. 331; but in a murder case, under the statute of Texas, the jury are required, by statute, to find by their verdict, whether the murder is of the first or second degree. If they do not find the degree of the murder, the verdict is fatally defective and void, although they find the defendant guilty: *Johnson v. State*, 30 Tex. App. 419, 28 Am. St. Rep. 930.

HOMICIDE—NEW TRIAL—FORMER JEOPARDY.—One who procures a reversal of a judgment of conviction waives his right of objection to a second trial, on the ground that he has been once in jeopardy: *McGinn v. State*, 46 Neb. 427, 50 Am. St. Rep. 617. A prisoner is not entitled to be discharged upon the ground that a new trial would put him twice in jeopardy for the same offense: *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791; note to *McGinn v. State*, 50 Am. St. Rep. 626; *State v. Smith*, 49 La. Ann. 1515, 62 Am. St. Rep. 680; *Commonwealth v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114; *Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791; but see *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154.

HOMICIDE—MURDER—COMMISSION OF FELONY.—The killing of a person during the commission of a felony is murder in the first degree: See monographic note to *Whiteford v. Commonwealth*, 18 Am. Dec. 786, on the statutory division of murder into degrees.

CONTINUANCE—ABSENT WITNESSES—NEW TRIAL.—An application for a continuance on account of the absence of a witness should not be granted unless the application shows diligence to secure the attendance of the witness, and states definitely the facts expected to be proved by him: *Miller v. State*, 31 Tex. Cr. Rep. 609, 37 Am. St. Rep. 836; and it should be overruled where the proposed evidence is not probably true: *Reynolds v. State*, 33 Tex. Cr. Rep. 143, 47 Am. St. Rep. 25. There is no error in refusing a new trial, because of the denial of an application for a continuance, where the application for a continuance was not well founded in fact: *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630. A continuance to procure witnesses is properly refused where little or no diligence has been exhibited in getting them: *State v. Burns*, 148 Mo. 167, 71 Am. St. Rep. 588. The refusal to grant a continuance to procure the testimony of an absent witness is not ground for a new trial where due diligence was not used, prior to the trial, to obtain such testimony: *Atkins v. Field*, 89 Me. 281, 56 Am. St. Rep. 424.

BARTH v. STATE.

[39 TEXAS CRIMINAL REPORTS, 381.]

EVIDENCE — CONFESSIONS — PROPER WARNING — NECESSITY OF.—A confession made by a person under arrest is not admissible in evidence against him in the absence of a proper warning that it can be so used. The warning given must be in substantial compliance with the statute, though it is not necessary that the confession should immediately follow the warning.

EVIDENCE — CONFESSIONS — PROPER WARNING — REASONABLE TIME.—If a confession by one under arrest is not made directly after the warning given, of its legal effect, it must, to be admissible, be made within such reasonable time thereafter as to indicate that the defendant yet remembered and was impressed with such warning, and that he made the confession under a due apprehension of its legal effect, to wit, that it could be used in evidence against him.

EVIDENCE — CONFESSIONS — PROPER WARNING — DOUBT AS TO TIME.—A confession made by one under arrest is not admissible, though he was warned by the officer to whom the confession was made that it could be used against him, where it does not appear how long after such warning the confession was made, and that it might have been one, two, or three weeks, for it cannot be assumed, under such circumstances, that the defendant was, at the time he made the confession, impressed with the idea that what he then said could be used in evidence against him, or that he knew that he was then making it under the conditions that had previously been stated to him by the officer.

EVIDENCE—CONFESSION TO THIRD PARTY AFTER WARNING BY SHERIFF—ADMISSIBILITY OF.—A confession made by one under arrest to a third party, long after a warning given by the sheriff to the defendant, that anything he might say could be used in evidence against him, is not admissible in evidence, where there was no other warning subsequent to that given by the officer, for the court cannot presume against the defendant that he then had the warning given him by the sheriff in mind, or that he knew that such warning was operative as to statements made by him to another person than the sheriff, who gave the caution.

EVIDENCE—CONFESSION OF A CRIMINATIVE CHARACTER — PROPER WARNING — ISSUE OF INSANITY.—A confession or statement of a defendant, while in jail, may be given in evidence against him on the issue of insanity, regardless of any previous warning that what he says may be used in evidence against him, except where the confession or statement is of a criminative character in connection with the crime for which he is to be tried, in which case the confession or statement cannot be used against the defendant in the absence of a proper warning.

TRIAL—ERROR IN ADMITTING TESTIMONY—WITHDRAWAL—RULE AS TO CURING ERROR.—To determine whether an error of the court in admitting testimony is cured by the subsequent exclusion thereof, and its withdrawal, by the court, from the consideration of the jury, the rule is that, if the testimony is not of a very material character, it may be withdrawn by the court, and the error be thus cured, but if, on the contrary, the evidence is of a material character, and is calculated to influence or affect the jury, its withdrawal from their consideration does not heal the vice of its admission.

HOMICIDE—EVIDENCE—RES GESTAE.—It is competent to prove by a witness that shortly after a homicide a party other than the deceased or defendant had wounds upon his person and was bleeding. The person himself is a competent witness to show that he received the wounds from the defendant, at the time of the killing, and this, being a part of the *res gestae* of the homicide, is admissible.

HOMICIDE—DEGREES — INSTRUCTIONS.—In a murder case, it is always best, as a general rule, to give both degrees of murder in charge to the jury, no matter how atrocious the circumstances attending the homicide may be.

Indictment charging the appellant with the murder of his wife, on December 9, 1897. Each was about seventy-four years of age at the time of the homicide. It appeared that they had lived together as man and wife, in reasonable peace and happiness, until the summer of 1897. Their son Carl, and their daughter, Mrs. Bertha Hopf, lived with them upon their little farm in Gillespie county, and Carl was assisting in working and managing the farm. Quite a controversy seems to have arisen between Carl and his father, during the summer of 1897, concerning the removal of a fence upon the farm. It resulted in a deed from the appellant to his wife of all the former's property, including the farm. The appellant went off to live with an older son, but after staying away for several weeks he returned and demanded a reconveyance. Mrs. Barth did not object or refuse to reconvey, but did object to the expense of executing the necessary instrument, on the ground that her own deed was void, and conveyed no title to her. Barth remained at home, sleeping apart from his wife. He and Carl had several disputes as to how the farming operations should be carried on, and Mrs. Barth had agreed with Carl in these controversies. Mrs. Barth finally insisted that Carl should take his father's place at the table, at meal time, inasmuch as he otherwise assumed to act as the head of the family. This matter gave rise to a discussion in which the appellant understood the other members of the family to say that they were all ashamed of him, and from that time on he persisted in eating his meals alone away from the table. It seems, too, that he ceased to have any further pleasant relations with any of the members of the family, particularly with his wife. Finally, while Mrs. Barth was sweeping out the hallway of the house one morning, the appellant fired upon her with a double-barreled shotgun, killing her instantly. He shot her in the back at such close range as to set her clothing on fire. Barth then assaulted Mrs. Hopf, who rushed into the hallway, and cut her about the

face with a razor. Mrs. Hopf fled immediately to the nearest neighbors, about half a mile off, and, after she left, the appellant cut his wife's throat from ear to ear, nearly severing the head from the body. He then attempted to cut the arteries of both of his own wrists with the razor, and was found lying in the yard, where he had almost bled to death. The defense set up on the trial was insanity, but there were no facts, outside of those stated, tending to show insanity, and Barth's family physician, who had been such for twenty years, and who treated the appellant for his self-inflicted wounds, after he was put in jail, testified that he was not insane.

A. W. Morsund, for the appellant.

Mann Trice, assistant attorney general, for the state.

³⁸³ HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death, and he prosecutes this appeal.

The state introduced the witness G. B. Riley, sheriff of Gillespie county, who testified that he arrested defendant, Fritz Barth, on December 9, 1897, on the charge for which he was being tried, and placed him in jail on the same day, where he remained up to the time of the trial, and, while said defendant was so in jail, he had two conversations with him; that at the time of having the first conversation with him in jail, which time the witness knows was before Christmas of 1897, he informed defendant that any statement he might make could be used in evidence against him; that he only informed defendant once, and cannot say whether the statement of defendant made to him, and proposed to be used as evidence against defendant, was made in the first conversation, after he had so informed defendant, or in the second conversation, had later—how long after he could not recollect; it may have been only one week or two or three weeks, but knows defendant's statement was after such caution. When the state offered to prove by the witness the statement so made by defendant to said witness, defendant objected, because defendant, being at the time under arrest, had not been properly cautioned, as required by law, to make such evidence admissible, and the evidence given failed to show that such statements were made after defendant was properly cautioned and under such caution; which objections were by the court overruled, and witness permitted to testify that defendant said he knew he had killed his wife, and they could do

as they pleased with him. Witness Riley stated these conversations occurred some time between December 10 and December 25, 1897, and after he had cautioned him.

In *Barnes v. State*, 36 Tex. 356, it was held that the confessions admitted in testimony should be contemporaneous with the caution; that is, should be made immediately after the caution given. In *Maddox v. State*, 41 Tex. 205, the rule above laid down was departed from to the ³⁸⁴ extent of permitting confessions to be introduced which were not made immediately after the warning given, but which were made by the defendant in that case to the same parties who had given the warning, and only a few hours afterward, on the same day, while they were taking him to jail. In *Baker v. State*, 25 Tex. Cr. App. 1, 8 Am. St. Rep. 427, the question came up in somewhat different form. In the latter case, the warning given was by the magistrate, who was conducting a preliminary examination of the case. He gave the warning required under the statute in regard to the privilege of defendant to make a statement. It appears that appellant at this time made no statement, but subsequently, some hours after the warning given by the magistrate, made a confession, while he was still under arrest, in the absence of the magistrate, to the officers who then had him in charge. In that case the court used the following language: "The fact that a few hours prior to the time of making said statements the defendant had been cautioned by the magistrate, before whom the charge against him was being investigated, that a voluntary statement, if he should make one, might be used in evidence against him, does not, we think, dispense with a caution with respect to statements subsequently made on another occasion, to another party, and under entirely different circumstances. The caution given him by the magistrate related alone to a voluntary statement—a judicial proceeding in the presence of the court—a written statement to be signed by the defendant. It would be stretching the rule too much, we think, to apply a caution made under such circumstances to any and all statements made by the defendant on subsequent occasions." The court appears to predicate its holding on the idea that the statements were not made to the officer giving the caution, and not embraced within that warning; that the warning given was intended to suggest a voluntary statement only, and not to suggest an extrajudicial confession, or one made to some other than the magistrate giving the warning. The decision appears to uphold a strict construction of the statutes regulating and con-

trolling confessions. We do not gather, however, from this decision that it was intended to decide that, before a confession is admissible, it must be made immediately after the warning given; and we think the true rule on this subject, as adduced from the authorities, is that the warning given must be in substantial compliance with the statute, and that the confession, if not made directly after the warning given, must be within such reasonable time thereafter as to indicate that the defendant yet remembered and was impressed with the warning given, and that he made the confession under a due apprehension of its legal effect, to wit, that it could be used in evidence against him. Applying this rule to the question here presented, we do not think that the statement or confession made was under such conditions as authorized its admission in testimony against appellant. The officer to whom the statement was made stated that he had warned or cautioned appellant that any statement he might make in regard to the homicide might be used against him, but he does not know how long prior to appellant's making said confession to him he gave said warning. He ³⁸⁵ states that it might have been a week, or two or three weeks. We cannot assume, from this general statement that appellant was, at the time he made the confession, impressed with the idea that what he then said could be used in evidence against him, or that he knew he was then making it under the conditions that had previously been stated to him by the officer.

The state was also permitted to prove by the witness, John McDugal, that he was the jailer of Gillespie county, and had charge of defendant while he was confined in jail on this charge; that some time after December 25, 1897, he had several conversations with the defendant; that he gave the defendant no caution or warning that any statement he might make could be used against him. The state was permitted by this witness to prove that while the defendant was in jail, some time after Christmas, he said to witness that he knew he had shot his wife; that his wife had said to him, "Only wait, we will get you yet," and he then took his gun and shot her; that he and his wife had quarreled eight days before. The bill of exceptions shows that this testimony was afterward, while the district attorney was making his opening argument, and after he had been speaking about twenty minutes, excluded by the court, and that the judge instructed the jury verbally not to consider the same as evidence in the case.

The state also introduced Dr. Keidel as a witness, who stated

that he visited appellant in jail, and that some time after Christmas he had a conversation with him, while appellant was yet in jail, and that he gave him no caution or warning that what he stated to him might be used in evidence against him on the trial; that in said conversation appellant stated to him: "You can do with me what you please. I know what I have done. Cut me into pieces; hang me; do as you please. You need not attend me." This evidence was admitted over the objections of the defendant. But after the opening argument of the district attorney had proceeded some twenty minutes, the court, of his own motion, informed the jury that this evidence was inadmissible, and that he withdrew such testimony from them, and that they should not consider it in the case.

In explaining these bills of exception, the court states that the confession of appellant to Dr. Keidel was made after George Riley, the sheriff, had already testified that he had cautioned the defendant, before Christmas of 1897, and told him that anything he might say could be used in evidence against him. With reference to this explanation we make the same observations that we made in regard to the admission of the statements made by appellant to the sheriff. And we make this additional observation: That this statement was still more remote than the statement made to the sheriff, because it was made to a different person, long after the warning given by the sheriff; and we cannot presume against appellant that he then had the warning given him by the sheriff in mind, or that he knew that said warning was operative as to statements made by him to another person than the sheriff, who gave the caution. Furthermore, ³⁸⁶ with reference to the matter contained in these last two bills of exception, it will be seen that no warning whatever was given by the parties to whom the confessions were made by appellant.

It is suggested that the statements made, however, are admissible, not as confessions of guilt, but as bearing upon the question of the insanity of the appellant, which was set up as a defense in this case. It has been held that acts and conduct of a defendant while in jail may be given in evidence against him on the issue of insanity, regardless of whether he had been warned prior to said acts and conversations: See *Adams v. State*, 34 Tex. Cr. Rep. 470; *Burt v. State*, 38 Tex. Cr. Rep. 397. In *Hurst v. State* (Tex. Cr. App., April 14, 1897), 40 S. W. Rep. 264, however, the rule above stated was qualified; and we there held, if the confession or statement was of a criminative char-

acter in connection with the case for which he was then being tried, that such acts and declarations could not be used, in the absence of a proper warning. Applying this rule to the testimony of the witnesses as to the statements made by appellant to them, we hold that this evidence should not have been admitted. The declaration of appellant made to McDugal, that appellant told him that he knew he had shot his wife, and that his wife had said to him, "Only wait, we will get you yet," and he then took his gun and shot, and that he and his wife had quarreled eight days before, while it might be used by the jury to show the sanity of appellant at the time of the homicide, as acting on motive, yet the very fact that such evidence showed motive would tend to show that the killing was upon express malice. Even if the jury had been instructed that they could only regard such testimony in considering the question of the insanity of the appellant, we do not see how, in the nature of things, the jurors could have avoided considering such testimony for the other purpose, to wit, of showing motive; that is, malice in connection with the killing. As was said in Hurst's case: "If the jury, under the charge of the court, should determine, from the statement of the defendant, that he had a reasonable and logical motive for the commission of the offense, to wit, revenge, and that he was consequently sane, then by what process of reasoning would they be able to call a halt, and refrain from using said testimony, not only for the purpose of establishing his guilt, but the grade of the homicide? If they could stop short in the use of this testimony at the point indicated by the court, then we concede to the ordinary juror a subtlety of reasoning and a restraining will power which, to say the least of it, would appear to be extraordinary." We would make the same observations with reference to the statement of appellant made to the witness, Dr. Keidel.

But it is said that the error of the court in admitting this testimony is cured by the subsequent exclusion thereof and withdrawal by the court of said testimony from the consideration of the jury. This question has been before the courts of this state in a number of cases: See *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Miller v. State*, 31 Tex. Cr. Rep. 609, 37 Am. St. Rep. 836. We think the true rule on this subject to be: If the testimony is not of a very material character, it may be withdrawn by the court, and the error ³⁸⁷ thus cured; but, if, on the contrary, the evidence was of a material character, and was calculated to influence or affect the jury, the withdrawal

of the same from their consideration would not heal the vice of its admission. As was said in *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269: "It is true that the admission of some kinds of testimony, which a jury is afterward directed not to consider, may not be sufficient cause for reversal; but we are of opinion that where, in cases like the present, evidence which is calculated to arouse the sympathies of jurors in favor of the party who offers it, and to arouse the feelings of the jurors against the opposite party, is erroneously permitted to go before the jury, it is ground for reversal." If this is a good rule in civil cases, by a stronger reason it ought to be the rule in criminal cases. In our opinion, the statements made by appellant were of a material character. Indeed, the testimony elicited from McDugal was the strongest evidence the state had to prove express malice, and we do not believe that the withdrawal of this testimony by the court could eradicate its effect from the minds of the jury.

With regard to the testimony of Fritz Schaefer, that when Mrs. Bertha Hopf came to his house on the morning of the homicide, shortly thereafter, she had wounds on the side of her face, and was bleeding, we think the same was admissible, but not anything that she may have said about it. She herself was a competent witness to prove the fact of how she received the wounds, and this, being a part of the *res gestae* of the homicide, was admissible.

It is not necessary here to discuss the testimony or its sufficiency. The issues in the case were either that appellant was guilty of murder in the first degree, upon express malice, or, if he was insane at the time of the act, that he was guilty of no offense. It occurs to us that the case can be very easily tried without the admission of illegal or improper testimony. We would not be understood as holding that the inferior degrees of homicide should not be given by the court in his charge. As a general rule, it is always best to give both degrees of murder, no matter how atrocious the circumstances attending the homicide. For the errors discussed, the judgment is reversed and the cause remanded.

Hurt, presiding judge, absent.

THE SUBJECT OF CONFESSIONS received some attention in *Hamlin v. State*, 39 Tex. Cr. Rep. 579. This was a case in which Hamlin and Carrie Holmes were charged with having murdered Walter Holmes, the husband of Carrie Holmes, by administering poison to the deceased. One count of the indictment charged Ham-

lin as principal, and the other count charged Carrie Holmes as principal. and Hamlin as an accomplice. Hamlin had had illicit relations with Carrie Holmes for about a year antedating the homicide, and this, in connection with his desire to marry her, was the motive which actuated him in getting rid of the deceased. There was no question as to the guilt of Carrie Holmes, the principal, though she was not on trial. It was abundantly established, both by circumstantial evidence and by her own confessions, that she poisoned her husband with arsenic, administered to him in water four different times during the week before his death, and the circumstances amply connected Hamlin as an accomplice in the charge.

Some time before the parties were indicted and arrested for the crime, Hamlin had a meeting with Dr. Hayes, a brother in law of the deceased, who had been collecting evidence in the case, and Dr. Stanlee, the father of Carrie Holmes, in which he admitted illicit relations with Carrie Holmes, but claimed that the latter was to blame therefor. He also admitted that they had agreed to marry, and wait for each other twenty years if necessary; and that he told her that Walter Holmes, the deceased, was a stout, robust man, and would likely outlive both of them. He also said that they were to have been married on December 17th, following, "if circumstances would permit." This conversation, or these statements, were testified to, and admitted. The appellant contended that they were not freely and voluntarily made by him, but were made under duress or fear superinduced by the conduct of Hayes and the appellant's environments at the time. It was not pretended that the appellant was under legal arrest, or in the custody of an officer, or that Hayes and Stanlee had any authority to restrain him, or to offer any promise or inducement to him, but the objections to the statements made were based solely on the antecedent circumstances leading up to the meeting, in connection with the circumstances attending it.

"We understand," said Henderson, J., delivering the opinion of the court, "that the same rule is here applicable which applies to a confession at common law, if what was said by appellant at the time can be called a confession. The rule at common law is simply to the effect that it must appear that the confession was freely and voluntarily made before it will be received as evidence against the accused. And confessions were equally as admissible if the party was under arrest, or in jail, as if made under other circumstances, there being no objection as to the admissibility of the testimony, unless, perhaps, the courts would more closely scrutinize a confession made by a party under arrest, or in jail, in order to ascertain if the same was freely and voluntarily made.

"Our statute, however, changes this rule, and, before a confession made by a party who is under arrest, or in jail, is receivable in evidence, it must appear that the same was freely and voluntarily made after the party had been warned or cautioned by the officer that anything he might say would be used in evidence against him. As stated above, the statements or confessions of the party here were not made while he was under arrest or in jail; but it is claimed that he was under such duress at the time as shows that his said statements were not freely and voluntarily made. The rule at common law and in most of the states is that the admissibility of confessions is a question solely for the court. After such admission, however, it is competent for the defendant to introduce before the jury all the testimony tending to show that the confessions were not freely and voluntarily made; and where testimony of this character is introduced, either for the state or the defendant, it is the province of the court to instruct the jury that they can

look to all the facts and circumstances in evidence in order to determine the degree of credit they will attach to the confessions: See note to *Daniels v. State*, 6 Am. St. Rep. 242; *Rice v. State*, 47 Ala. 38; *Young v. State*, 68 Ala. 569; *State v. Freeman*, 12 Ind. 100; *State v. Dildy*, 72 N. C. 325. And this seems to have been the rule formerly in this state: See *Carter v. State*, 37 Tex. 362; *Cain v. State*, 18 Tex. 387.

"But more recently our courts seem to have adopted the rule, where there is testimony tending to show that the confession is not admissible, as where there is any evidence to the effect that the party was under duress or in jail, and not properly warned after the admission of such testimony by the court, to instruct the jury with regard to such confession that if they believed it was made under duress, or when the party was in jail and not properly warned, and that such confession was not freely and voluntarily made, they would exclude it altogether from their consideration; thus enabling the jury to pass upon the question of law—that is, the admissibility of the confession: See *Speer v. State*, 4 Tex. Cr. App. 474; *Rains v. State*, 33 Tex. Cr. Rep. 294; *Sparks v. State*, 34 Tex. Cr. Rep. 86; *Carlisle v. State*, 37 Tex. Cr. Rep. 108. And this seems to accord with the practice in Georgia and Massachusetts: See *Holsenbake v. State*, 45 Ga. 43; *Stallings v. State*, 47 Ga. 572; *Mitchell v. State*, 79 Ga. 730; *Bailey v. State*, 80 Ga. 359; *Commonwealth v. Cuffee*, 108 Mass. 285; *Commonwealth v. Nott*, 135 Mass. 269; *Commonwealth v. Smith*, 119 Mass. 305; *Commonwealth v. Preece*, 140 Mass. 276. However, whether the jury excluded the evidence altogether, if they determined that it was not freely and voluntarily made, or disregarded it, is the same in practical effect. We quote from Mr. Rice as follows: 'When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise, it should be excluded. When there is conflicting testimony, the humane practice is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant': See *Rice on Criminal Evidence*, sec. 308.

"It will be remarked, in this connection, that the judge trying this case instructed the jury, in effect, in accordance with the above; so the sole question for our determination is, whether the circumstances surrounding the appellant, Hamlin, at the time he made the confessions were of such a character as to show that he was, at the time under duress, such as to indicate that his statement was not freely and voluntarily made, and in fact was not the truth. Of course, the surrounding circumstances can always be looked to by the court, primarily, to determine whether or not there was duress; secondarily, these surrounding circumstances can be looked to by the jury, under instructions from the court, in order to determine what degree of credit they will give the confession, or whether they will regard it at all": See *Rice v. State*, 47 Ala. 38; *Young v. State*, 68 Ala. 569; *Thomas v. State*, 35 Tex. Cr. Rep. 178.

The court then examined the facts and circumstances in evidence surrounding the appellant at the time to determine whether he was under such duress at the time as to render his declarations or statements absolutely inadmissible. It appeared that, on the morning of the day on which the declarations or statements were made, Hayes had had a fight over some business transaction with the appellant; that Hayes had knocked him down and had beaten him; that shortly after the fight Hayes had requested the appel-

lant to come to the former's house, on that afternoon, as he and Stanlee wanted to talk to him; and that this request was coupled with a threat from Hayes that if Hamlin did not come, "he would make him hard to catch." It also appeared that, after Hamlin had arrived at the house, on the afternoon of the interview, and had gone into a room, before the interview, Hayes closed the door and demanded of Hamlin that he make them a full statement of his and Mrs. Holmes' connection with the killing of the deceased, Holmes.

It did not appear, however, that Hamlin was compelled to go. He had ample time after the request and threat to have invoked the law for his protection, if he apprehended trouble should he fail to go, for it was some four or five hours after the request in the morning before the interview in the afternoon. It did not appear that any threat was made against him after he went, or that he was coerced to talk. No arms were exhibited by the parties, and, for aught that appeared, what Hamlin said was voluntary on his part. "It may," said the court, "be conceded, as stated above, that the environments as shown by the evidence, raise some question as to whether the confessions or statements of the appellant were entirely free and voluntary; but we do not understand that this would exclude the testimony, the rule being that the court is first to determine the admissibility of the confession, and if there are facts and circumstances tending to show that it was made under duress, and was not entirely free and voluntary, that this matter should be submitted to the jury under appropriate instructions. We could cite a number of cases where such evidence has gone to the jury under circumstances of a more serious nature than is here indicated: See *Rice v. State*, 47 Ala. 38; *Young v. State*, 68 Ala. 569; *State v. Freeman*, 12 Ind. 100. We know of no case where the testimony of coercion was as slight as in this case where the evidence of confession has been withheld from the jury."

After the homicide, the appellant, while in jail, wrote a letter to Carrie Holmes, who was also in jail, in another cell. In this letter, Hamlin avowed his affection for Carrie Holmes, and his trust in her; and he beseeched her therein "not to give him away." This letter was admitted in evidence, the jailer having testified that he had warned Hamlin, after he was put in jail, that anything he might say or do while confined in jail could be used in evidence against him. The jailer saw the letter, after the warning given, and testified as to its contents. He did not state how long it was after he gave the warning before he read the letter. For aught that appeared, it might have been immediately. The appellant claimed that he was not warned, as required by law, to make the statement, that is, the letter written, admissible, and that it was not a statement or confession freely made by him after proper warning, but the court held that the appellant was bound to show that such an interval of time had elapsed after the warning and before the witness saw the letter as to suggest that the appellant did not, at the time, have in mind the warning which had been given. He did not, therefore, bring himself within the rule as laid down in *Barth v. State*, 39 Tex. Cr. Rep. 381, ante, p. 935, said the court.

The appellant also claimed that the letter was not an admission, statement, or confession made to the witness by the defendant, but the court held that it is not necessary to the admissibility of a confession that it should have been made to the sheriff or other person who gave the warning. The court did not consider that there was anything in the contention that the confession, as contained in the letter, was not "freely and voluntarily" made after warning

given. It was not intended by the appellant that it should be seen by the officer, but was intended to influence Carrie Holmes in her conduct, and it seemed to have been written absolutely free from restraint. It was also held that the letter was not inadmissible on the ground that Carrie Holmes was in jail and unwarned; and that her confessions, made after the consummation of the crime, and in the absence of her accomplice, Hamlin, were admissible to establish her guilt as a principal, though the charge of the court should have limited the testimony to that purpose, as was done.

EVIDENCE—CONFESSIONS—ADMISSIBILITY OF—CAUTION.—Confessions of a party accused of crime are admissible in evidence only when it is clearly shown that they were freely and voluntarily made: *People v. Kennedy*, 159 N. Y. 346, 70 Am. St. Rep. 557; *Bradford v. State*, 104 Ala. 68, 53 Am. St. Rep. 24; note to *Lauderdale v. State*, 37 Am. St. Rep. 793; and, if the defendant is under arrest, in jail, or other place of confinement, it must be further shown that the confession was made voluntarily after he had been first cautioned that it might be used against him: *Lauderdale v. State*, 31 Tex. Cr. Rep. 46, 37 Am. St. Rep. 788; *Crowder v. State*, 28 Tex. App. 51, 19 Am. St. Rep. 811. See monographic note to *Daniels v. State*, 6 Am. St. Rep. 242, on the admission of confessions in evidence.

EVIDENCE IMPROPERLY ADMITTED—EFFECT OF WITHDRAWAL OF.—The effect of withdrawing and excluding evidence erroneously admitted, and which may have been prejudicial in its nature and tendency, is to cure the error, unless the evidence is of such a prejudicial character as to so influence the jury against the defendant that he would be deprived of a fair and impartial trial: *Miller v. State*, 31 Tex. Cr. Rep. 609, 37 Am. St. Rep. 836.

HOMICIDE—RES GESTAE.—THE STATEMENT of a wounded and bleeding person as to the cause and manner of her injury terminating in her death is admissible as a part of the *res gestae*, when made immediately after the occurrence, although with such an interval of time as to allow her to run from the room in which she was stabbed to another room upstairs in the same building: *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727.

HOMICIDE—DEGREES OF MURDER—INSTRUCTIONS.—The court should define and explain the different degrees of murder and manslaughter which are warranted by any theory of the evidence in a murder case: Note to *Croom v. State*, 21 Am. St. Rep. 187.

EX PARTE MCCARVER.

[39 TEXAS CRIMINAL REPORTS 448.]

MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS.—COURTS are not inclined to inquire into the reasonableness of ordinances passed under an express grant of power by the legislature, but, as to ordinances passed under the general powers of a city, courts will not hesitate to declare them void where they appear to be unreasonable.

MUNICIPAL CORPORATIONS—"CURFEW" ORDINANCE—WHEN UNREASONABLE AND VOID.—A city ordinance declaring it to be unlawful for any person under twenty-one years of age to go upon the streets later than fifteen minutes after the ringing of what is called the "curfew bell," provided for by the ordinance, unless such person is accompanied by his or her parent or

guardian, or is in search of the services of a physician, is not necessary to preserve the good order and morals of the community, but, on the contrary, is paternalistic and an invasion of the personal liberty of the citizen. Such legislation is unreasonable, and the ordinance is, therefore, illegal and void.

John C. Kay and P. A. Martin, for the relator.

W. W. Walling and Mann Trice, assistant attorney general, for the respondent.

449 HENDERSON, J. This is an appeal from a proceeding under a writ of habeas corpus. It appears in the city of Graham, Young county, the city council have passed what is termed a "curfew ordinance," as follows:

450 "Ordinance No. 30.

"An ordinance prohibiting persons under the age of twenty-one years from remaining or being found upon the streets of Graham after 9 o'clock at night.

"Be it ordained by the city council of the city of Graham, in session assembled, that:

"Section 1. Any person under the age of twenty-one years who shall be found upon any of the streets or alleys of the city of Graham at night, and later than fifteen minutes after the ringing of the curfew bell as hereinafter provided, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than five dollars nor more than fifty dollars.

"Sec. 2. Be it further ordained that the foregoing section shall not apply to any person under the age of twenty-one years who shall, at the time of being so found upon the streets or alleys of said city, be accompanied by his or her parent or guardian, or to any person or persons in search of the services of a physician, provided such person or persons at the time of being so found is actually executing such errand.

"Sec. 3. Be it further ordained by the city council of the city of Graham that the city marshal of the city of Graham, at and on each and every day at 8:45 o'clock P. M. shall ring, or caused to be rung, the church bell at the Baptist Church in said city, and said bell shall be known as the 'curfew bell.'

"Sec. 4. Be it further ordained, that this ordinance shall take effect and be in force from and after its publication, according to law.

"Approved February 28, 1898.

"J. S. STARRETT,
"Mayor."

That after said ordinance went into effect the relator, a young man nineteen years of age, was found by the city marshal of the city of Graham on the street more than fifteen minutes after the city marshal had rung the curfew bell at the Baptist Church, in said city, on the night of the 18th of April, 1898. That said marshal held and detained him for a violation of said ordinance. He sued out a writ of habeas corpus, and, upon an examination of the case, he was remanded by the county judge, and he now prosecutes this appeal.

The question here presented is as to the legality of said ordinance. If it be such a one as the city council had a right to pass, then the relator is entitled to no relief; otherwise he is. It appears that a distinction is made between ordinances passed under an express grant or power by the legislature and ordinances which are merely passed under a general power. As to the former, courts are not inclined to inquire into their reasonability, but, as to the latter, if an ordinance does not appear to be reasonable, the courts will declare it void: See 17 Am. & Eng. Ency. of Law, 247, and authorities there cited; Cooley's Constitutional Limitations, 4th ed., 243, 244, and note.

It is not shown in the statement of facts how the city of Graham is ⁴⁵¹ incorporated, but we take it for granted that it is incorporated under the general act of the legislature on the subject, and it only has such authority as is conferred on it by the provisions of such general act. Article 419 of the Revised Civil Statutes of 1895 gives the municipal authorities exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon. A number of articles also confer authority on the city council to do certain things. But we fail to find any authority expressly authorizing the city council to pass a "curfew ordinance," as it is termed, or an ordinance making it a misdemeanor for a person under twenty-one years of age to be found on the streets or public highways of any city or town after 9 o'clock at night. So that the authority to pass this ordinance must be under the general powers of the city to preserve the peace, and to protect the good order and morals of the city. Article 457 would seem to prescribe the authority of the council in this respect. It is as follows: "The city council shall by ordinance have authority to prevent all trespasses, breaches of the peace and good order, assaults and batteries, fighting and quarreling, using abusive, obscene, profane, and insulting language, misdemeanors, and all disorderly

conduct, and punish all persons thus offending." If this is the express authority on the subject, it would appear to exclude the authority of the council to go beyond it. But we will treat the question on the proposition as to whether or not, conceding that the municipality has authority under its general powers to pass any ordinance that is reasonable to preserve the public peace and to protect the good order and morals of the community, the ordinance in question is reasonable. We hold that it is not; that it is paternalistic, and is an invasion of the personal liberty of the citizen. It may be that there are some bad boys in our cities and towns whose parents do not properly control them at home, and who prowl about the streets and alleys during the night-time and commit offenses. Of course, whenever they do, they are amenable to the law. But does it therefore follow that it is a legitimate function of government to restrain them and keep them off the streets when they are committing no offense, and when they may be on not only legitimate errands, but engaged in some necessary business? At common law, a conspiracy was an indictable offense, and under our statute a conspiracy to do certain things is an offense. If persons go upon the street, whether under or over age, in pursuance of a conspiracy to commit burglary or some other offense, they are indictable. But it is not claimed here that the going upon the streets by appellant was in pursuance of any conspiracy to commit any offense. We understand it to be made unlawful for any person under twenty-one years of age to go upon the streets after 9 o'clock at night, or, more strictly speaking, later than fifteen minutes after the ringing of what is called the "curfew bell" provided for by the ordinance. True, some exceptions are made. For instance, a person under twenty-one years of age may go upon the streets with his parent or guardian, and such person can go upon the streets in search of the services of a physician, but these are the only ⁴⁵² exceptions. We can well imagine a number of other exceptions. Indeed, so numerous do they occur to us that they serve themselves to bring into question the reasonability of the law. A minor may be unavoidably detained away from home until after night; yet, in passing along the streets on his way to his home, he commits an offense. He may be at church or at some social gathering in the town, and yet, when the curfew bell tolls in the midst of a sermon or exhortation, he would be compelled to leave and hie himself to his home, or, if at a social gathering, he must make his exit in haste. He could not be

sent by his parents to a drugstore, or, for that matter, on any errand, save and except for a physician. The rule laid down here is as rigid as under military law, and makes the tolling of the curfew bell equivalent to the drum taps of the camp. In our opinion, it is an undue invasion of the personal liberty of the citizen, as the boy or girl (for it equally applies to both) have the same rights of ingress and egress that citizens of mature years enjoy. We regard this character of legislation as an attempt to usurp the parental functions, and as unreasonable, and we therefore hold the ordinance in question as illegal and void: See *St. Louis v. Fitz*, 53 Mo. 582; *Chicago v. Trotter*, 136 Ill. 430. The relator is ordered discharged.

ORDINANCES—REASONABLENESS.—COURTS do not inquire into the reasonableness of city ordinances when power exists to pass them. The inquiry must be confined to the existence of such power: *Skaggs v. Martinsville*, 140 Ind. 476, 49 Am. St. Rep. 209; note to *State v. Davidson*, 69 Am. St. Rep. 482. But municipal ordinances may be declared void by the courts on the ground that they are unreasonable: *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678; and the reasonableness of a municipal ordinance is a proper subject for judicial inquiry, if enacted under a general grant of authority not prescribing the manner of its exercise: *Champer v. Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 390. Ordinances in contravention of common or private rights are void: See monographic note to *Robinson v. Mayor*, 34 Am. Dec. 636, discussing general limitations on the power of municipal corporations to pass ordinances.

FAVRO v. STATE.

[89 TEXAS CRIMINAL REPORTS, 452.]

BURGLARY—"HOUSE"—WHAT IS.—A tent or structure made by placing two forked mesquite poles, about seven feet high, into the ground, with a ridge pole thereon, and stretching over this a wagon sheet, the ends of which are brought down to the ground and nailed on each side to planks nailed to stakes in the ground, the east end of the structure being boxed up with boards, while a door and some boxes, with the wagon sheet tied over them, close up the west end, is a "house," within the meaning of a statute relating to burglary, and defining a house to be "any building or structure erected for public or private use, of whatever material it may be constructed." Hence, a defendant may be convicted of burglary for entering such a structure and taking away the occupant's property therefrom.

BURGLARY—EVIDENCE—UNEXPLAINED POSSESSION OF STOLEN PROPERTY.—A defendant charged with burglary may be convicted upon evidence that the burglarized house was entered by some one, and property taken therefrom; that the defendant was found in possession of the stolen property within two or three days after the alleged burglary; and that his possession of the stolen property was unexplained.

BURGLARY—PLEADING—OWNERSHIP OF PREMISES.

In charging burglary, it is not necessary to allege that the occupant of the house burglarized owns the land upon which the house stands. One who enters a house, in the exclusive possession of the occupant, who sleeps and lives therein, may be convicted of burglary, if he takes property therefrom, although the occupant of the house does not own the land upon which it is erected.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

453 DAVIDSON, J. Appellant was convicted of burglary, and appeals.

There is no bill of exceptions in the record. The building burglarized is thus described: "It was made of a wagon sheet and boards, about as follows: I put two forked mesquite poles, about seven feet high, in the ground, and then put a pole from one to the other, and then stretched a wagon sheet over the pole, and brought the ends down to the ground, and nailed them to planks on each side, which planks were nailed to stakes driven in the ground. Then I boxed up the east end of this tent with boards, and, the evening I left, I picked up an old door, and set it sideways in front of the west opening, leaving it up against the end pole. But, as this did not fill up the west end entirely, I also put some boxes at one end of this old door, and then tied the wagon sheet together about this old door. I did this to prevent a hog from getting in, and to prevent anything from entering. I knew there was a hog in that neighborhood, and fixed my place to prevent it from getting in. When I came back from Pearsall to my place on Monday, after I left on Saturday, I found that the door had been moved aside sufficient to allow one to pass into this house; and I missed a pair of blankets, a quilt, and a vest. The blankets belonged to Sanders & Peel, the quilt to Bud Pruitt, and the vest to me. I afterward saw the same blankets in the possession of the sheriff of Frio county." This is the testimony of Walter Ryman, the alleged owner. The proof shows that the land upon which this domicile was located belonged to Henry Maney, was rented to Sanders & Peel, but the house or structure was in the exclusive possession of Ryman. He resided in it. It was his castle or home. It is contended that this is not a "house," within the meaning of the statute, and that the possession of the property was not properly alleged.

Under the burglary statute, a house is defined to be: "Any building or structure erected for public or private use, whether

the property of the United States, of this state, or of any public or private corporation or association, or of any individual, of whatever material it may be constructed": Pen. Code, art. 843. The word "building" means "a fabric built or constructed; a structure; an edifice. As commonly understood, a house for residence, business, or public use, or for shelter of animals or storage of goods": Century Dictionary. "Structure" is defined to be "that which is built or constructed; an edifice or a building of any kind. In the widest sense, any production or piece of work artificially built up, ⁴⁵⁴ or composed of parts, joined together in some definite manner; any construction." "To erect" means "to raise and set up in an upright or perpendicular position; set up; raise up. To raise, as a building; built or constructed": Century Dictionary. In *Willis v. State*, 33 Tex. Cr. Rep. 168, it was held that a fruit-stand built in the shape of a piano box, but large enough for the proprietor to stand in while making sales, would be a "house," within the contemplation of this statute. Now, in this particular case, under the description given by the witness, Ryman, this structure comes within the definition of the term "house," as contained in article 843, above. Not only so; said structure or building was the residence of the witness Ryman, in which he slept, kept his clothes, bedding, provisions, and his other personal property. The case of *Williamson v. State*, 39 Tex. Cr. Rep. 60, ante, p. 901, is not in point. In that case, the structure broken into was a portable grain box, which was moved from place to place with the grain thresher, as it was carried from farm to farm for the purpose of threshing grain, said grain box being a part and parcel of the threshing outfit. We held in that case that said box was not a house, in the contemplation of said statute; and that said box was not used or intended to be used in any way or for any purpose connected with the habitation or other purposes for which houses are ordinarily used. It was further stated in that opinion: "We would not be understood as holding that it was absolutely necessary that the structure, in order to be considered a house, should be fixed to the soil, or that, because it is portable, it would not be considered a house. But we do hold, under the proof in this case, that this was not a house, but a mere box, constituting a part of the outfit for the thresher." An inspection of the evidence in this case discloses the fact that the *Williamson* case is not applicable here. The structure herein mentioned had the idea of permanency, was attached to the soil, was used by the occupant as his residence.

Such a structure is as much under the protection of the burglary statute as would be a structure entirely made of wood or stone, brick, or granite. The law does not mention the character of structure or the material of which it shall be made. It protects the humble tenant in his tent as well as his more fortunate neighbor in his palace: See *Anderson v. State*, 17 Tex. Cr. App. 305; *Willis v. State*, 33 Tex. Cr. Rep. 168; *Albritton v. State* (Tex. Cr. App., May 2, 1894), 26 S. W. Rep. 398. We are therefore of opinion that the structure described in the testimony was a "house," within the contemplation of the statute under discussion.

We are further of opinion that the second contention of appellant, that the possession of the property was not properly alleged, is erroneous. The alleged occupant, Ryman, was in exclusive possession, care, and control of the structure, and, as before stated, it was his domicile, where he slept and lived. It was not necessary for him to own the land upon which the structure was erected in order to constitute him the occupant under our burglary statute.

Nor is the further contention that the testimony is insufficient well taken. It is clear and unequivocal that the structure or house was entered ⁴⁵⁵ by some one, and property taken away; that the tent or structure was in the exclusive possession of Ryman; and that the defendant was found in possession of the stolen property within two or three days after the alleged burglary. His possession of the stolen property was unexplained. Under the decisions in this state, this testimony was sufficient. The judgment is affirmed.

BURGLARY.—A "HOUSE," in the sense of a statute relating to burglary, is any structure which has walls on all sides and is covered by a roof: See monographic note to *People v. Richards*, 2 Am. St. Rep. 389, on burglary. But compare *Williamson v. State*, 39 Tex. Cr. Rep. 60, ante, p. 901; and see, also, *Williams v. State*, 105 Ga. 814, 70 Am. St. Rep. 82.

BURGLARY—EVIDENCE—UNEXPLAINED POSSESSION OF STOLEN PROPERTY.—The presumption of guilt arising from the recent possession of stolen property is applied in cases of burglary and larceny as well as to cases of larceny: *State v. Warford*, 106 Mo. 55, 27 Am. St. Rep. 322. The possession of stolen goods, without other evidence of guilt, is not prima facie evidence of burglary: Note to *People v. Richards*, 2 Am. St. Rep. 397; but where goods have been taken by a burglar, and are immediately, or soon after, found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct will sustain the inference, not only that he stole the goods, but that he also made use of the means by which access to them was obtained: *Jackson v. State*, 28 Tex. App.

370, 19 Am. St. Rep. 839. See, also, *State v. Dale*, 141 Mo. 284, 64 Am. St. Rep. 513; and compare *King v. State*, 99 Ga. 686, 59 Am. St. Rep. 251.

BURGLARY — INDICTMENT — ALLEGATION OF OWNERSHIP.—It is sufficient, on a prosecution for burglary, if the ownership of the house, building, structure, or inclosure, is averred to be in the one who was in actual occupancy and possession at the time when the crime was committed: Note to *People v. Richards*, 2 Am. St. Rep. 395.

LONG v. STATE.

[39 TEXAS CRIMINAL REPORTS, 461.]

NEW TRIAL—CONTINUANCE—ALIBI.—In a case of circumstantial evidence, where the defendant is charged with the theft of mules, it is error to overrule a motion for a continuance to secure the testimony of a witness, where it would probably be true and would establish an alibi; and, if the defendant is convicted, a new trial should be granted because of such error.

LARCENY — THEFT OF MULES — ALLEGATION AND PROOF AS TO OWNERSHIP AND POSSESSION.—If an indictment for the theft of mules, belonging to a certain person, charges the possession to have been in him, the state must prove that fact. Hence, if the evidence shows that the mules had been left with another person, who looked after, salted, and fed them, and that the owner resided some distance from the farm upon and about which they ranged, an issue of possession is raised, and the defendant is entitled to an instruction that, if the jury believe that such other person had the care, custody, and control of the animals at the time they were stolen, they must acquit.

INDICTMENT.—TO TEST THE QUESTION WHETHER AN INDICTMENT FOR ONE OFFENSE INCLUDES ANOTHER, where the offenses are of the same general character, the indictment for the one offense must contain all the essential elements of the other, otherwise the prosecution for the latter cannot be maintained.

LARCENY—OFFENSES OF SAME GENERAL CHARACTER—CONVICTION FOR ONE UNDER INDICTMENT FOR ANOTHER.—A general indictment for theft does not include a charge of willfully driving livestock from its accustomed range without the consent of the owner, for the reason, among others, that the punishment of the one offense is essentially different from that of the other. Hence, a conviction for the latter offense cannot be had under a general indictment for theft.

W. S. Jameson and W. C. Newman, for the appellant.

W. W. Walling and Mann Trice, assistant attorney general, for the state.

461 **HENDERSON, J.** Appellant was convicted of theft of mules, and his punishment assessed at two years confinement in the penitentiary, and prosecutes this appeal.

By his first bill of exceptions appellant questions the action of the court in overruling his motion for a continuance and his motion for a new trial predicated on the same ground. The absent witnesses were Louis Ables and John Nichols, both alleged to be residents of Montague county, and who had been duly subpoenaed, but failed to attend at the trial. We think the diligence used was sufficient. Appellant proposed ⁴⁶² to prove an alibi by these witnesses. The testimony on the part of the state showed that the mules in question were taken in Clay county, near the little place of Newport, twelve or fourteen miles from the town of Bowie, in Montague county. The mules were found in the possession of the defendant and one Clark, between Bowie and Montague, on the evening of the 6th of May, about three or four miles west of the latter place, and about six or eight miles east of Bowie. The application shows that appellant expected to prove by the witness Louis Ables that he saw defendant come into the witness' chili stand about daylight on the morning of the 6th of May, 1895. This may be true, and yet it would not prove an alibi for appellant. On the contrary, it would be consistent with the state's case, for the theory of the state is that appellant stole the mules early on the night of the theft, and drove them through Bowie, and he could well have been there early on the morning of the 6th of May, as it was only twelve or fourteen miles from Newport. However, by the witness John Nichols, defendant's application shows that he expected to prove that appellant was in Bowie at 8:30 o'clock on the night of the 5th of May, and remained there all night. This testimony, if true, would be a complete alibi for appellant. The state's case was purely circumstantial, and we do not feel authorized to say that the testimony of this absent witness was not probably true.

Appellant insists that the court should have given the instruction asked by him to the effect that, the indictment having charged the possession to be in A. B. Snow, the state must prove that fact, and, if the jury believed that T. P. Pickens had the care, custody, and control of the alleged stolen animals, they would find appellant not guilty. We have examined the evidence on this point, and it occurs to us that there is enough testimony to have required the giving of the requested instruction. The mules in question belonged to Snow. He, however, did not live on his farm, but lived in the town of Newport, some two miles distant. His farm was rented to Pickens. He left three mules in charge of Pickens, and they were first

kept in the pasture. Subsequently, they were turned out on the range, and ran with Pickens' mules, and Pickens looked after them, and salted and fed them, with his own mules. Snow, in his testimony, says that Pickens took care of them and fed them for him. He states that he never did go out on the range to feed or salt them, but occasionally would go out to see how they were doing. Pickens says that he cared for and looked after the mules for Snow, and that he agreed to put them in the pasture and field with his mules, and attend to them for him; that he attended to them as he did his own; that he fed and salted them, etc. It occurs to us that this sufficiently raised the issue as to the possession of the mules at the time they were taken, and the court should have submitted that issue to the jury.

Appellant asked the court to instruct the jury, under article 884 of the Penal Code, to the effect that if the jury believe from the evidence that appellant willfully took into his possession, and drove, used, or removed the mules in question from their accustomed range, without the consent of ⁴⁶³ the owner, and with the intent to deprive the owner thereof, to find him guilty, and assess his punishment at confinement in the penitentiary for a term not less than two, nor more than five, years, or to fine him in a sum not to exceed one thousand dollars, or to assess against him both such imprisonment and fine. The court refused to give this charge, and appellant reserved his exception.

The contention of appellant is, that in every case where the evidence tends to show, under an indictment for theft, that the animals alleged to have been taken were driven from their accustomed range, without the consent of the owner, and with intent to defraud, it is incumbent on the court, when requested, to give such charge. He predicates this contention on said article 884, which makes the willful taking into possession by a person, and driving, using, or removing from their accustomed range, any livestock, not his own, without the consent of the owner, and with intent to defraud the owner thereof, theft, and the decisions of this court authorizing a conviction of said offense under said article under an ordinary indictment for theft. The article in question was passed in 1866, and has since been brought forward in the codes, and the decisions of our courts authorize a conviction for willfully driving stock from their accustomed range under an ordinary indictment for theft. This was first decided by Judge Ogden, and the de-

cision is based solely on a construction of article 3095 of Paschal's Digest, which is now article 752 of the Code of Criminal Procedure, which includes different degrees of offenses under certain crimes; the particular offense here being theft, which includes "swindling, embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code." This decision appears to have been followed without question until *Foster v. State*, 21 Tex. Cr. App. 80. In that case, and in *Smith v. State*, 21 Tex. Cr. App. 133, the matter again underwent discussion, and the same view was taken of the question, but Judge Hurt dissented from the opinion of the court. Judge White, in the *Foster* case, based his decision upon the statute making it a penal offense to willfully drive livestock out of the range, etc., and making said offense theft. We quote from his opinion as follows: "Every element of ordinary theft, as defined in article 724 of the Penal Code, is affirmatively declared in this provision of the law, except the single one, perhaps, that the taking must be with intent to appropriate the property to the taker's own use: 1. There is a willful taking with intent to defraud, which is in every respect tantamount to a fraudulent taking; 2. The removal or taking from the accustomed range, which is in law a taking from the possession of the owner, because stock in its accustomed range is in possession of its owner; 3. The removal must be without the consent of the owner; 4. The intent to defraud the owner, which is equivalent to an intent to deprive the owner of the value of the same; and 5. Under the circumstances stated, such proof of removal could not be otherwise than an appropriation. No other essential element than these is found in ordinary theft, and the only difference is in the punishment of the two offenses." ⁴⁶⁴ Judge Hurt dissented in that case, and in the subsequent case of *Smith v. State*, 21 Tex. Cr. App. 133, delivered a dissenting opinion, in which he took the position that theft and the willful driving of animals out of their accustomed range, etc., were distinct offenses, and that an ordinary indictment for theft did not apprise a defendant that he was to be tried for willfully driving animals out of their accustomed range, etc. As illustrative of this, he insisted that, as a necessary element of the latter offense, and essential to be proved, was the fact that the animal was removed from its accustomed range, and that there must be proof that the stock had an accustomed range, and, unless this proof is made by the state, a conviction could not be had under this clause. The fact that the stock

had an accustomed range was a matter of such importance that, if the state failed to prove this fact, it could not obtain a conviction, although all the other facts were proved; and he insisted that the mere fact that the offense was called theft did not make them one and the same; that acts and omissions, not names, constitute an offense, and they must be alleged in plain and intelligible language. Unquestionably, it is our duty to follow former decisions, unless, on mature deliberation, they appear not to be founded upon correct legal principles. Since that time we are not aware that this line of decisions has been questioned. But the matter is again presented, and we are confronted with the question whether or not we shall follow the rule on this subject heretofore laid down. It is a matter of vital importance, and, if we have been wrong, we should not hesitate to say so.

The mere fact that this offense is called "theft," if in fact it contains other elements than ordinary theft, and requires a different character of proof, would not authorize a prosecution of same under an ordinary charge of theft; and this, as we regard it, is the test or criterion by which this matter is to be judged. Subdivision 6, article 752, of the Code of Criminal Procedure makes theft include "all unlawful acquisitions of personal property punishable by the Penal Code," and especially includes swindling and embezzlement. Yet it has been held that neither of these offenses which are named can be punished under an indictment for theft. This is based on the fact that they contain elements essentially different and distinct from those contained in theft: See *Huntsman v. State*, 12 Tex. Cr. App. 619; *Frank v. State*, 30 Tex. Cr. App. 381. Moreover, it has been held that the prosecution cannot be maintained under article 877 of the Penal Code, where theft is by a bailee, under a general indictment for theft, simply because it contains distinctive elements constituting an offense not included in ordinary theft: See *Brooks v. State*, 26 Tex. Cr. App. 184; *Taylor v. State*, 25 Tex. Cr. App. 96, and see other authorities cited to note 1502 of *White's New Penal Code*. And the same may be said of theft from the person. A prosecution cannot be maintained for this offense under an ordinary indictment for theft: See *Harris v. State*, 17 Tex. Cr. App. 132; *Gage v. State*, 22 Tex. Cr. App. 123; *Nichols v. State*, 28 Tex. Cr. App. 105. Yet all these are unlawful acquisitions of personal ⁴⁶⁵ property, and, by the language of the code, would appear to be different degrees of offense included under a charge of theft.

Now let us examine this question in order to ascertain whether there is any essential difference in the elements which constitute ordinary theft and the elements which constitute the willful taking into possession, driving, using, or removal from its customary range any livestock, not one's own, etc. In the first place, we inquire if this statute merely has reference to ordinary theft, and the offense here outlined could be proven under a general indictment for theft, why the necessity of passing this statute at all? Evidently, the legislature had some purpose in its passage, and intended to apply some remedy which was not already provided for under existing law. In theft, the intent to steal must be contemporaneous with the act of taking into possession. This offense does not transpire when the possession is taken, but the taker must not only willfully take into possession, but he must then drive, use, or remove. Not only this, but the driving, using, or removing must be from its accustomed range. If it was ordinary theft, the instant the person takes it into possession, with the fraudulent intent to deprive the owner of the value thereof and to appropriate it to his own use, without the consent of the owner, he has committed theft. But in a case under this statute, no matter what his intent is, as long as he does not drive or remove the animal from its accustomed range, he has not committed the offense. This distinction, as we take it, is marked, and requires an entirely different line of proof. Evidently, the legislature had in mind some evil, aside from the ordinary crime of theft, and which was not included in that offense. Doubtless, there were persons in the state who, under one pretense or another, were in the habit of driving stock from its accustomed range; perhaps sometimes driving stock of their own, which became mixed with others, it being inconvenient or troublesome to separate, they drove beyond their accustomed range. They may have had at the time no intent to steal said property, but subsequently, after it was removed from its accustomed range, disposed of it. Possibly, it was to meet this character of wrongdoing that this statute was enacted, especially as by a subsequent statute it was provided that, if there was no intent to defraud, the offense might be treated solely as a misdemeanor. In addition, in an indictment for theft, the taking must be "fraudulent," but under this statute the act need only be "willfully" done. It will be readily seen that these two words mean different things. There is also a distinction between the intent in general theft and the intent under this statute. In

theft, the intent must not only be fraudulent, but it must be with intent to deprive the owner of the value of the thing taken, "and to appropriate the same to the use or benefit of the taker." But under this statute there need be no intent to appropriate to one's own use. It is said, however, that the intent to defraud is tantamount to an intent to appropriate to one's own use. We believe that this is a misconception. We can readily conceive of an intent to practice a fraud or defraud without ⁴⁶⁶ an intent to absolutely appropriate to one's own use; and it will be conceded that an indictment for theft, without containing the clause, "with intent to appropriate to the taker's own use," would not be a valid indictment. We think it is a good rule, laid down by Mr. Bishop, that where offenses are of the same character, in order to test the question whether an indictment for one offense includes the other, the indictment for the one offense must contain all the essential elements of the other, otherwise the prosecution for the latter cannot be maintained under the indictment; and, testing this matter by the above rule, we think it is clear that a general indictment for theft does not include a charge of willfully driving livestock from the range without the consent of the owner, etc. If this be not the rule governing this question, necessarily great confusion must result, and we think has resulted, from following the line of decisions on this subject before mentioned. The punishment for willfully driving stock out of the range is essentially different from the punishment provided for general theft, and may even be a misdemeanor. So that it follows, under the old rule, that under every indictment for general theft, where the proof shows that the property taken was livestock and that it was carried out of the range, it is incumbent on the court to give this statute in charge; and the court in this case, under the old rule heretofore discussed, should have given the requested charge. But we do not believe that, under correct legal principles, the old rule is correct, and we accordingly hold that the court did not err in refusing to give the requested charge, and the former decisions on this subject are hereby overruled. We now hold that, under an ordinary indictment for theft, a conviction cannot be had under the Penal Code, article 884, for willfully driving livestock out of the range, etc. But, for the errors heretofore discussed, the judgment in this case is reversed and the cause remanded.

CONTINUANCE—ABSENT WITNESSES—NEW TRIAL.—It is error, in a criminal case, to deny an application for a continuance to procure the presence of a material witness for the accused: *State v. Williams*, 18 Wash. 47, 63 Am. St. Rep. 869; *Ryder v. State*, 100 Ga. 528, 62 Am. St. Rep. 334; *Clark v. State*, 39 Tex. Cr. Rep. 179, ante, p. 918.

LARCENY—POSSESSION—PLEADING.—Under the Texas statute, an indictment charging theft must allege the possession from which the stolen property was taken: *Garcia v. State*, 26 Tex. 209, 82 Am. Dec. 605.

INDICTMENT FOR ONE OFFENSE—CONVICTION FOR ANOTHER.—The rule that one indicted may be convicted of a less offense than that charged applies only where the less offense is included in the higher: *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410. Offenses created by different statutes, or to which different penalties are annexed, are, in reality, distinct offenses, and cannot be included in the same count of an indictment: See monographic note to *Ben v. State*, 58 Am. Dec. 239, 249, on charging two or more offenses in the same indictment. Compare the extended note to *State v. Bell*, 92 Am. Dec. 661, on election of counts; and see the note to *Whitford v. State*, 5 Am. St. Rep. 899, on merger of crimes.

EX PARTE MANN.

[39 TEXAS CRIMINAL REPORTS, 491.]

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—COSTS IN CRIMINAL CASES.—The words, "imprisoned for debt," in a state constitution, which provides that no person shall ever be imprisoned for debt, do not apply to criminal proceedings. Hence, as the costs in a criminal case, due to officers, are not a debt, but a part and parcel of the judgment, their payment may be legally enforced in the same way as the fine itself, that is by imprisonment, or otherwise, as provided by statute, without violating the constitutional prohibition against imprisonment for debt.

PARDON CANNOT RELEASE CONVICT FROM PAYMENT OF COSTS—VESTED RIGHTS.—Constitutional and statutory authority to a governor to grant pardons and to remit fines and forfeitures does not empower him to interfere with the vested right of a private citizen. His power, in such cases, can go no further than the public may be interested. Hence, after a person has been convicted of a misdemeanor, and costs adjudged against him, a full pardon by the governor, although it mentions "fine and costs," cannot release the convicted person from the payment of the costs, because the officers or individuals to whom such costs are due have acquired individual and vested rights in them.

Habeas corpus proceeding in which the relator was remanded to custody for the nonpayment of costs in a misdemeanor case. The relator appealed.

Shropshire & Thurmond, for the relator.

Mann Trice, assistant attorney general, for the state.

⁴⁹² DAVIDSON, J. Relator was arrested under a *capias pro fine*, placed in jail, and resorted to the writ of *habeas corpus* for his discharge. The record discloses that in the spring of 1894 relator was convicted of a misdemeanor. In the following August, the then governor of the state, James S. Hogg, granted him a full and unconditional pardon, mentioning in said pardon the fine, costs, and imprisonment. Appellant was arrested by virtue of a *capias pro fine*, and placed in jail, because the costs had not been paid. Upon the hearing of the writ the court decided adversely to the relator, and he brings the question here for revision.

His contention is, that by virtue of the pardon he was relieved of all responsibility for the costs accruing under the criminal prosecution and conviction. We are cited, in support of this proposition, to the case of *Ex parte Gregory*, 56 Miss. 164. That case seems to sustain the appellant's view, but it is predicated upon the proposition that costs in a criminal case are not a part of the punishment, but a debt due the officers, and, being a debt, the party cannot be imprisoned for its collection. We do not understand the proposition stated in that case to be a correct enunciation of the law. This very question came up in the case of *Dixon v. State*, 2 Tex. 482, and costs were held not to be a debt within the meaning of our constitution. We quote from that opinion as follows: "The words 'imprisonment for debt' have a well-defined and well-known meaning, and have never been understood or held to apply to criminal proceedings: *Ex parte Fleming*, 4 Hill, 581; *Moak v. De Forrest*, 5 Hill, 605; *Lynde v. Montgomery*, 15 Wend. 461. It is not to be supposed, and it will scarcely be contended, that it ever entered into the minds of the framers of the constitution that they were to be understood as having any application to the administration of the criminal ⁴⁹³ laws, or that they were to have the effect to prevent the punishment of crimes. It was well known to them that the abolition of imprisonment for debt in other states, where it had been effected, had been held to consist with the enactment of laws for the punishment by imprisonment of criminal frauds perpetrated to avoid the payment of debts. How, then, can it be supposed that they intended that it should extend to the prevention of imprisonment for other crimes, when no such inference is deducible from the language employed? It could not have been their intention to degrade the subject of mis-

fortune to the level of the criminal, and to confound debt with crime. There is nothing to be found in the legislation of the country to warrant such a supposition. On the contrary, they have been made the subject of distinct and quite dissimilar provisions. . . . The fines and costs imposed for offenses are not so properly the principle as an incident; not the end, but a means of enforcing obedience to the laws." Such, we understand, has been the well-settled law in Texas since the rendition of that opinion. If there are decisions to the contrary in this state, they have escaped our observation. The whole theory of the law in Texas with reference to the enforcement of fines in misdemeanor convictions includes costs as a part and parcel of the judgments. Provision is made, under all the statutes that relate to the subject, for the enforcement of their collection by incarcerating the party in jail, or working him upon the public roads and highways, or in the public workshops, or on county poor farms, or by hiring out, as the case may be; but in every instance the costs are worked out, or paid, or collected, in the same manner as the fine itself. Throughout the history of the criminal laws of Texas, pecuniary fines imposed in misdemeanors have been collected in some of these modes, as provided by the statute. It is well settled that where a party is incarcerated in jail for a failure to comply with the judgment against him, he cannot obtain his release by simply paying the fine, but that he must pay the costs; and in his application for a writ of habeas corpus he must show, in order to obtain his release, that the fine and costs have been paid, or that he has been in jail a sufficient length of time to have discharged such fine and costs under the provisions of law, or that he has worked a sufficient length of time, as required by our statutes, to discharge said fine and costs. So we see, by reference to these provisions of the statute, that the opinion in the Dixon case, is in direct harmony with the whole theory of the laws of Texas on this subject from the beginning.

Under our constitution, "the governor has the authority, under such rules as the legislature may prescribe, to remit fines and forfeitures." This authority is found in section 11, article 4, of the present constitution. Following this, the legislature has enacted that, "in all criminal actions, except treason and impeachment, the governor shall have power after conviction to remit fines, to grant reprieves, commutations of punishments, and pardons": See Code Crim. Proc., art. 1016. And, following this idea, our supreme court, in *State v. Dyches*, 28 Tex.

535, held that the governor had no authority to remit the costs. It seems to ⁴⁹⁴ be a rule of almost universal application that the remission by pardon of a fine or forfeiture cannot divest an interest in either which by law is vested in a private person or persons. In some of the states they seem to draw a distinction between the remission of punishment before and after sentence. In this state, no such distinction can arise, because, under the terms of the constitution, the pardoning power cannot be exercised at all until after conviction: Const., art. 4, sec. 11. In those jurisdictions where it is held that the governor may remit the costs before sentence, it is also held that he cannot do so after sentence. We have not examined the condition of the constitution and laws in those states where this distinction has been drawn. But, even under those decisions, the governor of this state would not have the authority to remit the costs, because in no case can he remit the fine, forfeiture, or things of this character, until after conviction. And in the case of Dyches, our supreme court held that the forfeiture of a bail bond was included under the terms of the constitution. The authority of the governor to pardon or remit fines, forfeitures, and penalties, is one placed within his power and authority by the people of this state, to be exercised in the name and behalf of the people, and it is for the benefit of the public. He is their representative. They have not conferred authority upon him to take away the rights of individuals or of officers of the state when these rights have become vested. His pardoning power, or his power to remit fines, forfeitures, and penalties, can go no further than the public may be interested. So we may say, as far as the citizen is concerned, when any of his rights have become vested, it is beyond the power of the governor to interfere. Such we understand to be the unbroken line of authorities. We hold that the pardon granted by the governor cannot operate as a release of the convicted person, in a case like the one in hand, from the payment of costs adjudged against him. Without going further into a discussion of the question, we cite the following authorities in support of the views herein expressed: *Ex parte McDonald*, 2 Whart. 440; *Estep v. Lacy*, 35 Iowa, 419, 14 Am. Rep. 498; *State v. Farley*, 8 Blackf. 229; *State v. McO'Brien*, 21 Mo. 272; *Schuykill Co. v. Reifsnyder*, 46 Pa. St. 446; *Holliday v. People*, 5 Gilm. 214; 1 Bishop's Criminal Law, sec. 916; *In re Boyd*, 34 Kan. 573; *State v. Mooney*, 74 N. C. 98, 21 Am. Rep. 487; *Smith v. State*, 6 Lea, 637;

Chitty's Criminal Law, 742, 764; 3 Inst. 240, 241; 5 Bacon's Abridgment, 286, 287; 4 Blackstone's Commentaries, 399; United States v. Lancaster, 4 Wash. C. C. 64, Fed. Cas. No. 15,557; In re Flournoy, 1 Ga. 606; Black on Constitutional Law, 275; In re Wheeler, 34 Kan. 96; People v. Cotton, 14 Ill. 414; McCool v. State, 23 Ind. 127; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470; Musser v. Stewart, 21 Ohio St. 353; Ex parte Cottrell, 13 Neb. 193; Hawes v. Cooksey, 13 Ohio, 242.

We find no error in the judgment, and it is affirmed.

IMPRISONMENT FOR DEBT—COSTS IN CRIMINAL CASES.—

A statute directing that the defendant in a criminal proceeding may be imprisoned for failing to pay the costs of the prosecution is valid. It does not violate the constitutional prohibition against imprisonment for debt: See monographic note to State v. Brewer, 37 Am. St. Rep. 761, on what statutes violate prohibitions against imprisonment for debt: Colby v. Backus, 19 Wash. 347, 67 Am. St. Rep. 732.

A PARDON DOES NOT DISCHARGE LIABILITY FOR COSTS: See monographic note to State v. McIntire, 59 Am. Dec. 579, on pardon, where other views are presented.

RED v. STATE.

[89 TEXAS CRIMINAL REPORTS, 667.]

CRIMINAL LAW—PRINCIPALS OF DIFFERENT DEGREES.—At common law, principals in the commission of crime are of the first and second degree. A principal of the first degree is one who does the act, either in person or through an innocent agent, and a principal of the second degree is one who is present, lending his countenance, aid, encouragement, or other mental aid, while another does the act.

CRIMINAL LAW—PRINCIPALS—WHO ARE—PLEADING.

Under the statute of Texas, there is no division of principals in the commission of crime, but all are principals who are present and encourage or aid in the act; but neither at common law nor under that statute is it necessary to allege the facts relied upon to show a defendant to be a principal, although the offense may not have been actually committed by him, if he is a principal by reason of the part performed by him in the commission of the offense.

CRIMINAL LAW — PRINCIPALS — INTENT — TEST OF CRIMINALITY.—The guilt of one who is present and aids or encourages the commission of a crime, and who is called, at common law, a principal in the second degree, is measured by the intent of the one actually committing the crime, where both have the same intent and purpose, but if the intent of the one who so aids or assists is a different criminal intent, he is guilty according to the intent with which he may have performed his part of the act.

HOMICIDE — MURDER — PRINCIPALS — INTENT — CONVICTION OF DIFFERENT DEGREES.—It is competent, under an

indictment charging several persons as principals in murder, to convict one of such principals of one degree of felonious homicide, and another of some other degree of felonious homicide; according to the intent with which such principals may have performed the particular act attributed to and proved against them.

HOMICIDE — MURDER — PRINCIPALS — INTENT — INSTRUCTIONS.—In a murder case, where the one who actually committed the crime may be guilty of one degree of felonious homicide, and the one who aided or abetted him may be guilty of another degree of felonious homicide, the case should be properly presented to the jury as to the person actually committing the offense, embracing his or her intent; and then the jury should be instructed that if the aider or abettor, knowing such intent of the actual committer of the crime, entered into it, and aided such doer, with some other intent on his part, of a greater or less degree, to find him guilty and assess his punishment accordingly.

King & King and S. M. Long, for the appellant.

Mann Trice, assistant attorney general, for the state.

608 HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life; hence this appeal.

The charge in the indictment was the murder of an infant child immediately after its birth, by suffocation, strangling, and by some means unknown to the grand jury. On the trial, the state introduced the mother of the said infant, Epsy Keith, who was evidently an accomplice. Her testimony showed that illicit relations existed between her and defendant; that said child was born on Friday night, alive, no one being present except herself and defendant; that defendant immediately took the child from the room where it was born, and while it was still living and crying, and that she did not see the child again; that he returned in a short time, and thereafter, on the following Monday, informed her that he had buried it near the path leading to the spring under the large double oak tree. She further stated as the reason for her making different statements in regard to this matter that she was afraid John Red, who had threatened her, would kill her. Several days after the birth of said child, in pursuance of the suggestion of Epsy Keith, it was found buried under the oak tree near the path. The umbilical cord was wrapped around its neck, but it was not shown that it was choked to death by this means. No marks of violence were shown on the body. The doctors who made the post mortem examination, after applying the hydrostatic test to the lungs, testified that in their opinion the child was born alive. There was also testimony tending to show that appellant, about the time suspicion was aroused in regard to the

child, fled from the county, but was captured and brought back. The testimony also shows that after his arrest, and after he had been duly warned, he stated to the officer that Epsy Keith had killed the child by suffocating it with her hand, that he was present at the time, and that at her request he buried it. A number of witnesses were introduced by the defendant in impeachment of the witness Epsy Keith, showing that she had stated to a number of persons that the child was born dead, and exculpated appellant. These are substantially all the facts proved on the trial.

The court charged the jury only on murder in the first degree. Applying the law to the facts, he instructed them, in effect, in one paragraph of the charge, that if they believed the child was born alive, and appellant killed it by suffocating and strangling it, etc., of his express malice aforethought, to find him guilty of murder in the first degree. In another paragraph of the charge, the court, after defining who were principals, instructed the jury as follows: "Now, if you believe from the evidence, beyond a reasonable doubt, that Epsy Keith, in Franklin county, Texas, on or about the twentieth day of December, A. D. 1896, did give birth to a child; that said child, if any, was born alive, and in existence, by actual and complete birth, as explained to you; and if you believe from the evidence, beyond a reasonable doubt, that said Epsy Keith did on or about said time, in the county of Franklin and state of Texas, and after said birth, if any, unlawfully, violently, and intentionally, by strangling, ~~and~~ smothering, or suffocating it, kill said child; and if you further believe from the evidence, beyond a reasonable doubt, that the defendant, John Red, was present, and knew the unlawful intent and purpose of the said Epsy Keith, and did then and there, with express malice aforethought, with a sedate and deliberate mind, and formed design to take the life of said child, aid by acts, or encourage by words or gestures, the said Epsy Keith in taking the life of said child, if she did take it—then and in that case you will find the defendant guilty of murder in the first degree."

We have quoted at length the above charge, because appellant's main contention for a reversal of this case is predicated thereon. He contends that the charge as to the guilt of Epsy Keith would only make her guilty of manslaughter, or at most murder in the second degree, and that appellant's guilt is measured by hers; that is, he can be convicted for no greater offense than she could be convicted of. At common law, there

were principals of the first and second degree. "A principal of the first degree being one who does the act either in person or through an innocent agent." "A principal of the second degree is one who is present, lending his countenance, aid, encouragement, or other mental aid, while another does the act": 1 Bishop's Criminal Law, sec. 648. Under our statute, there is no such division of principals, but all are principals who are present and encourage in the act, including both the one actually performing the act, and others who may be present aiding in its performance. While there are no degrees under our statute, yet the principles governing the question who are principals are the same; and both at common law and under our statute it is not necessary to allege the facts relied upon to show the party to be a principal, although the offense may not have been actually committed by him, if he is a principal by reason of the part performed by him in the commission of the offense: Williams v. State, 42 Tex. 392; Gladden v. State, 2 Tex. Cr. App. 508; Davis v. State, 3 Tex. Cr. App. 91; Tuller v. State, 8 Tex. Cr. App. 501; Mills v. State, 13 Tex. Cr. App. 487. The contention of appellant that a principal of the second degree, or one who, under our statute, did not actually commit the offense himself, but who was present, and, knowing the unlawful intent, etc., aided the person who did commit it, can only be convicted of the same degree as the actual doer, is not a sound one. If he enters into the commission of the offense with the same intent and purpose, then his offense will be of the same degree as the actual doer, but he may have a different criminal intent from the one who perpetrates or does the act; and in such case he will be guilty according to the intent with which he may have performed his part of the act: Guffee v. State, 8 Tex. Cr. App. 187; and authorities cited in White's Annotated Penal Code, sec. 92; Rex v. Murphy, 6 Car. & P. 103; 1 Wharton's Criminal Law, secs. 214, 220, 479. We therefore hold that it is competent, under an indictment charging all as principals in murder, to convict one of such principals of one degree of felonious homicide, and another of some other degree of felonious homicide, according to the ⁶⁷⁰ intent with which such principals may have performed the particular act attributed to and proved against them. And, if the court had properly charged as to the degree of guilt of Epsy Keith, the jury might have convicted appellant in this case of murder in the first degree, although they may have believed from the evidence that Epsy Keith killed the child, and under the proof would

be guilty of some lower grade of felonious homicide. An examination of the charge, however, shows that same does not furnish the jury a proper rule by which to measure or gauge the degree of homicide as to Epsy Keith. They are told if she, by violence, intentionally and unlawfully killed the child, and if he was present, and by his express malice, etc., aided, etc., he would be guilty of murder in the first degree. This charge, as to her, does not define any degree of felonious homicide. As to her, it is not a charge on murder in the first or second degree, because it contains no suggestion of malice aforethought, either express or implied, and it does not present a proper charge on manslaughter: *Jennings v. State*, 7 Tex. Cr. App. 350. Our statute on principals, which was given in charge by the court, provides as follows: "When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent of the person committing the offense, aid by acts, or encourage by words and gestures, those actually engaged in the commission of the unlawful act, all such persons are principals, and may be prosecuted and convicted as such": Pen. Code, art. 75. So the general rule would seem to be that the guilt of the principal in the second degree, or one aiding the doer of the act, is measured by the intent of the one actually committing the offense. In order to measure this intent, the law measuring and defining the intent of the actor or doer, it occurs to us, should be properly given; the statute being, if a person present, knowing such unlawful intent, aids the doer thereof by acts, etc., he is guilty with the same intent and purpose. If, in a particular case, the actual doer of the offense may be guilty of one degree of felonious homicide, and the aider or abettor guilty of another degree, the case should be properly presented to the jury as to the person actually committing the offense, embracing his or her intent; and then the jury should be instructed that if appellant, knowing such intent of the actual committer of the offense, entered into it, and aided such doer, with some other intent on his part of a greater or less degree, to find him guilty and assess his punishment accordingly. In this case, if Epsy Keith killed the child, she may have been guilty of murder in the first or second degree—possibly of manslaughter. If appellant aided or encouraged her, knowing the unlawful intent which possessed her, he may have been guilty of the homicide in the same degree, or he may have been guilty of the homicide in some other degree, according to the intent which actuated him. We hold

that the jury should have been properly instructed as to the guilt of Epsy Keith (that is, of what degree of homicide, as suggested by the facts, she may have been guilty, based on her intent), and that then they should have been instructed, as ⁶⁷¹ suggested by the facts, of what degree of homicide appellant may have been guilty, predicated upon the intent which may have actuated him.

Appellant contends that this case should be reversed on account of certain denunciatory remarks of the district attorney in his closing argument. The remarks were improper, but it is not necessary to discuss them, inasmuch as the case must be reversed on account of the failure and refusal of the court to properly instruct the jury as above discussed. For the error of the court in failing to instruct the jury as heretofore discussed, the judgment is reversed and the cause remanded.

Hurt, presiding judge, absent.

CRIMINAL LAW—PRINCIPALS—WHO ARE—INDICTMENT. All who are present concurring in murder are principals: *State v. Jenkins*, 14 Rich. 215, 94 Am. Dec. 132; and if those who aid and abet the commission of a crime are required by the statute to be indicted as principals, the indictment must be the same as though they were principals: See monographic note to *State v. Hildreth*, 51 Am. Dec. 375, on what is aiding and abetting crime.

HOMICIDE—ACCOMPLICES AS PRINCIPALS—CONVICTION ACCORDING TO INTENT.—Those who advise, encourage, aid, or abet the killing of another are as guilty as though they took his life with their own hands. A principal in the crime of murder need not be specifically a party to the killing, if he is present and consenting to the assemblage by which it is perpetrated in pursuance of the common design: *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320. Under a statute abolishing the distinction between accessaries before the fact and principals, and making all accessaries before the fact principals, the acts of the principal are thus made the acts of the accessory, and the latter may be charged as having done the acts himself, and may be indicted and punished accordingly: *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, and note; and an abettor in a crime may be guilty of murder, though his principal be guilty of manslaughter: *State v. Crank*, 2 Ball. 66, 23 Am. Dec. 117.

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2. **ACTIONS—PRACTICE.**—If an answer in an action at law admits plaintiff's cause of action and sets up a purely equitable defense, it converts the whole case into a suit in equity, triable by the chancellor; but if such answer sets up two defenses, one equitable and the other legal, plaintiff is still entitled to a jury trial, unless the equitable defense prevails. (*Ridgeway v. Herbert*, 464.)

3. **ACTIONS—NOTE AND MORTGAGE—CONCURRENT REMEDIES.**—One who holds a note secured by mortgage has two separate and independent remedies which he may pursue successively or concurrently; one is on the note against the person and property of the debtor, and the other is by foreclosure to enforce the mortgage lien upon his real estate. (*Colby v. McClintock*, 557.)

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2. **APPEAL—SUPPLYING OBJECTIONS.**—A court, on appeal, will not supply a defect in the bill of exceptions, or supply grounds of objection. (*Clemmons v. State*, 923.)

3. **APPEAL FROM ORDERS—MOTION TO STRIKE OUT.**—If, in an appeal from an order in a special proceeding which does not authorize or call for the settlement of a statement of the case by the lower court, the order appealed from was made upon an application based wholly upon certain papers and documents, all of which are transmitted to the supreme court, a motion to strike from the records certain of such documents, on the ground that they cannot be properly transmitted to the supreme court in the absence of a settlement of the case, is without force or merit, and cannot be entertained or granted. (*Oliver v. Wilson*, 784.)

4. **APPEAL FROM JUDGMENT BEFORE ENTRY.**—If, after a hearing upon the merits, the trial court directs its clerk to issue a peremptory writ of mandamus, and to enter judgment in favor of plaintiff for his costs and disbursements, and, prior to the entry of such judgment, but subsequently to the service of such order, the defendant serves a notice of appeal to the supreme court stating therein that the appeal is taken both from the order directing the writ to issue and from the judgment, such appeal is premature and inoperative, and must be dismissed as to the judgment, but is operative as to the order. (*Oliver v. Wilson*, 784.)

5. APPELLATE PRACTICE—TYPEWRITTEN BRIEFS AND ABSTRACTS.—Although the abstracts and briefs filed in the supreme court are typewritten, and the briefs contain no references to the pages of the abstracts of evidence, these facts present no grounds for a dismissal of the appeal. (*Oliver v. Wilson*, 784.)

6. APPEAL—ORDERS, WHEN APPEALABLE.—An order granting a peremptory writ of mandamus is a "final order affecting a substantial right made in a special proceeding," and therefore appealable under the statute. (*Oliver v. Wilson*, 784.)

7. APPEAL—CLAIM NOT AVAILABLE ON—CHANGE FROM LAW TO EQUITY.—If an action has been brought as an action at law, and it has been tried and determined as such, and the defendants have moved to dismiss because the plaintiff has mistaken his remedy, the plaintiff cannot, on appeal, avail himself of the claim that the evidence is sufficient to support a bill in equity. (*Stephens v. Meriden Britannia Co.*, 678.)

8. APPEAL—WHEN THE QUESTION AS TO WHETHER A FACT IS SUPPORTED BY EVIDENCE IS ONE OF LAW.—If the appellate court, under the New York practice, reverses the judgment of the trial court, without disturbing the facts presumed to have been found by that court, which include all facts warranted by the evidence and necessary to support the judgment, the question whether a fact found has the support of any evidence, which, according to any reasonable view, warranted the trial judge in finding it, is a question of law for review in the court of appeals. (*Gannon v. McGuire*, 694.)

9. APPELLATE PRACTICE—MATTERS NOT CONTAINED in the record and not disclosed thereby cannot be considered on appeal. (*Hanscom v. Meyer*, 544.)

10. APPELLATE PRACTICE—THEORY AT TRIAL.—If an attachment is not controverted, but conceded throughout the trial, the parties to the action must be held to that theory on the appeal. (*Fearey v. O'Neill*, 440.)

11. APPEAL.—AN ASSIGNMENT OF ERROR that the defendant waives no rights under the constitution of the United States or of the state alleges no errors which can be reviewed on appeal. (*McDonald v. Commonwealth*, 293.)

12. APPEAL—WRIT OF ERROR—REFUSAL OF NONSUIT.—A writ of error will not lie to the judgment of a court refusing to grant a nonsuit. (*Truxton v. Fait & Slagle Co.*, 81.)

13. APPEAL—REVIEW OF DISCRETION—CROSS-EXAMINATION.—As the extent to which cross-examination shall be carried is, in some degree, a matter of discretion with the trial court, its ruling thereon, where no abuse of discretion is shown, will not be disturbed on appeal. (*Grimbley v. Harrold*, 19.)

14. APPEAL — FINDINGS — PREJUDICIAL ERROR.—When the facts found within the issue, in an action on a contract, are sufficient evidence of a valid contract, no prejudicial error is shown, even if there are findings beyond the issue. (*Grimbley v. Harrold*, 19.)

15. APPEAL BONDS—DAMAGES RECOVERABLE—DETENTION OF REAL PROPERTY.—The obligors on an appeal bond given in an ejectment case in the federal courts are liable for all damages arising from the use and detention of the property pending the appeal, including the loss of rents. (*Estate of Gleeson*, 808.)

See Instructions, 2.

ASSAULT.

1. ASSAULT—AGGRAVATED—MEANS INFLECTING DISGRACE—CONSTRUCTION OF STATUTE.—If a statute defines an aggravated assault to be one where the means used are such as inflict disgrace upon the person assaulted, "as an assault and battery with a whip or cowhide," the naming of a whip or cowhide does not limit the character of the assault to those means, but the statute contemplates any other means which inflict disgrace. (Slawson v. State, 914.)

2. ASSAULT, AGGRAVATED—MEANS INFLECTING DISGRACE—WHAT ARE INCLUDED.—Any means used in making an assault, the natural tendency of which is to disgrace the assaulted party, may be an aggravated assault under a statute which defines such an assault to be one where the "means used are such as inflict disgrace upon the person assaulted." (Slawson v. State, 914.)

3. ASSAULT, AGGRAVATED—LASCIVIOUS CONDUCT.—If a male person pulls up the dress of a chaste female person, against her will and consent, with undue familiarity, and to the extent of forcibly feeling of her legs, body, and private parts, and inserting one of his fingers into her vagina, such treatment constitutes an aggravated assault which inflicts disgrace upon the person assaulted. (Slawson v. State, 914.)

4. ASSAULT, AGGRAVATED.—THE GRAVAMEN of the offense of aggravated assault, where the means used are such as to inflict disgrace upon the party assaulted, is the constraint or sense of shame. (Slawson v. State, 914.)

5. INFORMATION—SUFFICIENCY OF, AS TO SHOWING OF SEX.—An information which charges that the defendant did commit an aggravated assault by means inflicting "disgrace" upon the person assaulted, naming her, and did "feel and fondle her legs, body, and vagina," and "did insert his finger" in her vagina shows the gender of the parties. The use of the pronoun "his" sufficiently designates that the defendant was a male person, it not being necessary to allege that he was an adult male, and the reference to the prosecutrix as "her," as well as the reference to her vagina, sufficiently indicates that she was of the female sex. (Slawson v. State, 914.)

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See Insurance, 18, 42; Corporations, 2.

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See Insurance, 9, 25; Judgments, 8; Negotiable Instruments, 5, 6.

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See Building and Loan Associations; Insurance, 39-46; Statutes, 7; Trademarks, 1.

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ATTACHMENT.

1. ATTACHMENT—LOGS—SUFFICIENCY OF DESCRIPTION.—If an officer is commanded by the precept of his writ to "attach all logs drawn" by the defendants, and "lying by" a certain railroad, in places specified, the description of the property is sufficiently definite to enable the officer to find and take possession of it, though it is found three or four rods from the track, where the particular logs to be attached are distinguishable from other logs there by certain marks upon them. Logs lying no farther than that from the track of a railroad may well be said to be "lying by the railroad." (*Hopkins v. Rays*, 554.)

2. ATTACHMENT—SUFFICIENCY OF DESCRIPTION.—For the purpose of attachment, a description of the property is sufficient if the officer, by the exercise of reasonable diligence, can find the property. (*Hopkins v. Rays*, 554.)

3. ATTACHMENT ON LAND—SUFFICIENCY OF LEVY.—In order to constitute a valid levy of an attachment upon land, whether occupied or vacant, and to give the necessary notice to the nonresident owner, the officer must do some act which shows that he has seized the property and exercised dominion over it; otherwise the court acquires no jurisdiction over the land. The mere fact that an officer makes an entry of levy upon an attachment is not sufficient to constitute a valid levy upon land belonging to a nonresident, nor does a statement made by the attorney of the plaintiff to the owner of the land, that it has been seized under attachment, and that the proceedings are then pending, constitute such notice to the attachment defendant as will give the court jurisdiction. (*Baker v. Aultman*, 132.)

4. EXEMPTIONS — CLAIM OF — ATTACHMENT — REMEDY AGAINST OFFICER.—Defendant, claiming an exemption in attached property, has a remedy against the attaching officer by motion to discharge the attachment, if the seizure is made under writ of attachment; and if the motion is granted, the property must be released from the levy. (*Oliver v. Wilson*, 784.)

5. EXEMPTIONS — CLAIM OF — ATTACHMENT — REMEDY AGAINST OFFICER.—If an officer unlawfully refuses to turn over exemptions demanded and claimed by the defendant in attachment, he may maintain a civil action in the nature of trespass, trover, or replevin against such officer and his bondsmen. (*Oliver v. Wilson*, 784.)

See Process, 1, 3; Trusts, 3.

ATTORNEY AND CLIENT.

1. ATTORNEY AND CLIENT—POWER OF DISCHARGED ATTORNEY.—If a client, after discharging his attorney, permits him to remain such on the record, he is bound, as against parties ignorant without fault on their part, of his discharge, by any act that, by virtue of his retainer, he is authorized to do. (*Beliveau v. Amoskeag Mfg. Co.*, 577.)

2. ATTORNEY AND CLIENT—POWER OF ATTORNEY TO DISPOSE OF INFANT'S ACTION.—An attorney of record for an

infant, employed by the infant's next friend, has the same power to bind his client to a final disposition of the action that he would have in the case of an adult, but he is also answerable, as in the case of an adult, for any abuse of his authority, express or implied. (*Beliveau v. Amoskeag Mfg. Co.*, 577.)

3. ATTORNEY AND CLIENT—POWER OF ATTORNEY TO DISPOSE OF ACTION.—An attorney of record may bind his client to a final disposition of an action by oral or written agreement entered on the record, made an order of court, and executed by the adversary in good faith, without knowledge of any limitation upon the attorney's authority; and the fact that the agreement and order of court thereon effect a compromise of the client's cause of action is an immaterial circumstance. (*Beliveau v. Amoskeag Mfg. Co.*, 577.)

BAILMENTS.

1. BAILMENT—WHAT CONSTITUTES—FURNISHING AND IMPROVEMENT OF PROPERTY.—When property in an unmanufactured state is delivered by one person to another, upon an agreement that it shall be manufactured or improved by his labor and skill, and, when thus improved, shall be divided between the respective parties in certain proportions, or sold and the proceeds divided, the transaction is a bailment, the original owner retaining his exclusive title to the property until the contract is fully executed, although the value of the labor to be performed by the bailee may equal or exceed the value of the property at the time he received it. (*Sattler v. Hallock*, 686.)

2. BAILMENT OR SALE—MANUFACTURING FARM PRODUCE INTO PICKLES.—When a number of farmers, who own a pickle factory, deliver to one who represents them jointly with a business firm certain farm products, upon an agreement that the firm shall manufacture such products into pickles, and furnish the labor, utensils, and additional materials; that such products shall be sold as the products of a farmers' company subsequently to be organized; and that the net proceeds shall be divided in specified proportions between the farmers and the firm, the transaction imports a bailment and not a sale, particularly where the parties to the contract understand it to be one of bailment. (*Sattler v. Hallock*, 686.)

3. BAILMENT—ACTION BY BAILEE FOR CONVERSION—WHEN NOT MAINTAINABLE.—Under a contract of bailment, where farmers, who own a pickle factory, furnish farm produce at their factory to be manufactured there into pickles by a business firm, the net profits to be divided, the farmers retain title to their produce until the contract is completely executed. Hence, if the firm makes a general assignment for the benefit of creditors before it fully executes the contract, the farmers are entitled to the produce and its products, manufactured or unmanufactured, in the factory at the time of the assignment, and the bailee has no such title thereto as will enable him or his assignee to maintain an action against the farmers for a conversion of the property, where they have possession thereof and refuse to deliver it. (*Sattler v. Hallock*, 686.)

BANKS AND BANKING.

CO-OPERATIVE BANKS—AUTHORITY OF TREASURERS OF.—The treasurer of a co-operative or a savings bank has no implied authority to bind the corporation by the acceptance of an order drawn on it for the payment of money. (*Jewett v. West Somerville etc. Bank*, 259.)

See Payment, 4.

BENEFICIARIES.

See Homesteads, 3, 4; Judgments, 11.

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See Appeal, 2.

BONA FIDE PURCHASER.

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BONDS—LIABILITY ON.—THE OMISSION OF ONE OF SEVERAL OBLIGORS in a bond to join in the execution of the bond, although named as an obligor in the body of the instrument, is no defense to the obligors who did sign. (Estate of Gleeson, 808.)

See Appeal, 15; Executors and Administrators, 8; Negotiable Instruments, 9; Replevin, 3.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS.—Upon the insolvency of a building and loan association and its consequent inability to proceed as anticipated when the loan was made, the borrowing member becomes entitled to be credited with whatsoever he has actually paid as premium for the purpose of securing the loan, but not to payments made upon stock pledged to secure the payment of such premium. (Hale v. Cairns, 746.)

2. BUILDING AND LOAN ASSOCIATIONS—INSOLVENT—CREDIT OF DUES AND PREMIUM.—A borrowing member has no right, on the insolvency of the corporation, to be credited with payments made by him on shares of stock pledged to secure the repayment of his loan, and the same rule applies to payments made by him on such shares when pledged to secure the premium agreed to be paid to enable him to secure his loan. (Hale v. Cairns, 746.)

BURDEN OF PROOF.

See Insurance, 48; Libel, 12; Negligence, 7; Vendor and Purchaser, 5.

BURGLARY.

1. BURGLARY—ENTRY BY INSERTION OF INSTRUMENT. If one instrument is used both for the purpose of breaking into and of committing an ulterior crime within the building, it is sufficient to show an entry by proving that the instrument so used was inserted into the building and used in committing the burglary, without showing that the accused entered the building in person. (State v. Crawford, 772.)

2. BURGLARY—ENTRY BY INSERTION OF INSTRUMENT. If one instrument is employed, not only to break into, but also to effect the only entry contemplated or necessary to the consummation of the criminal intent, and when it is intruded into the building, breaking it, effecting an entry, enabling the person introducing it to consummate his intent, and thus acquire dominion over the property intended to be stolen, the crime of burglary is complete, without any entry in person by the burglar. (State v. Crawford, 772.)

3. BURGLARY—ENTRY BY INSERTION OF INSTRUMENT. The boring of holes into a granary from the outside and thereby ex-

tracting grain therefrom is such a breaking and entering of the building as to constitute burglary, without any personal entry by the accused. (*State v. Crawford*, 772.)

4. **BURGLARY—"HOUSE"—WHAT IS.**—A tent or structure made by placing two forked mesquite poles, about seven feet high, into the ground, with a ridge pole thereon, and stretching over this a wagon sheet, the ends of which are brought down to the ground and nailed on each side to planks nailed to stakes in the ground, the east end of the structure being boxed up with boards, while a door and some boxes, with the wagon sheet tied over them, close up the west end, is a "house," within the meaning of a statute relating to burglary, and defining a house to be "any building or structure erected for public or private use, of whatever material it may be constructed." Hence, a defendant may be convicted of burglary for entering such a structure and taking away the occupant's property therefrom. (*Favro v. State*, 950.)

5. **BURGLARY—"HOUSE"—WHAT IS NOT.**—A PORTABLE "HEADER BOX," fourteen feet long, six feet wide, four feet high on one side, and eighteen inches on the other, such as is commonly used with a grain harvester, is not a "house" within the contemplation of a statute relating to burglary, although it has four sides and is covered over, for it has no permanency of location or fixedness of place, and is not used, or intended to be used, in any way or for any purpose connected with a habitation, or other purposes for which houses are ordinarily used. (*Williamson v. State*, 901.)

6. **BURGLARY—PLEADING—OWNERSHIP OF PREMISES.** In charging burglary, it is not necessary to allege that the occupant of the house burglarized owns the land upon which the house stands. One who enters a house, in the exclusive possession of the occupant, who sleeps and lives therein, may be convicted of burglary, if he takes property therefrom, although the occupant of the house does not own the land upon which it is erected. (*Favro v. State*, 950.)

7. **BURGLARY—EVIDENCE—UNEXPLAINED POSSESSION OF STOLEN PROPERTY.**—A defendant charged with burglary may be convicted upon evidence that the burglarized house was entered by some one, and property taken therefrom; that the defendant was found in possession of the stolen property within two or three days after the alleged burglary; and that his possession of the stolen property was unexplained. (*Favro v. State*, 950.)

CARRIERS.

CARRIERS—CONNECTING—INJURY TO BAGGAGE—PRESUMPTION.—Where baggage is delivered to a carrier in good condition and is checked "through" to its destination, the passage being over several connecting roads, and at the end of the journey the baggage is found to be damaged, the presumption is that the injury occurred while it was in the control of the last carrier, and the burden is on such last carrier to explain that the loss was otherwise. (*Moore v. New York etc. R. R. Co.*, 298.)

CEMETERIES.

1. **CEMETERIES—DAMAGES FOR REMOVAL OF BODY.**—A person who is the owner of the easement of burial in a cemetery lot, or rightfully in possession of such lot, is entitled to recover damages from anyone who wrongfully enters upon such lot and disinters the remains of a person buried therein. (*Jacobus v. Congregation etc.*, 141.)

2. **CEMETERIES—DAMAGES FOR INJURY TO GRAVE-STONES.**—If a gravestone or monument erected on a cemetery lot is defaced or removed during the lifetime of the person erecting it, he may recover damages from the one who inflicts the injury, and, if it is inflicted after his death, the heirs of the person in whose memory the stone was erected are entitled to maintain the action. (*Jacobus v. Congregation etc.*, 141.)

3. **CEMETERIES—DAMAGES FOR DISINTERMENT OF BODY.**—In a suit for damages for disinterring a body buried in a cemetery, if the injury was wanton and malicious, or the result of gross negligence or a reckless disregard of the rights of others, equivalent to an intentional violation of them, exemplary damages may be awarded, and in estimating them the injury to the natural feelings of the plaintiff may be taken into consideration. (*Jacobus v. Congregation etc.*, 141.)

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGES—VALIDITY—WANT OF FILING—DELIVERY AND CHANGE OF POSSESSION.**—A chattel mortgage which is neither filed as required by law, accompanied by an immediate delivery nor followed by an actual and continued change of possession of the property mortgaged, is not absolutely void. It is void as against subsequent judgment creditors of the mortgagor, but is good as between the parties thereto, and as against creditors at large. (*Stephens v. Meriden Britannia Co.*, 678.)

2. **CHATTEL MORTGAGES—MORTGAGEE AS WITNESS.**—A mortgagee in a chattel mortgage is disqualified from being a subscribing witness thereto, by reason of his being an immediate party to the instrument. (*Donovan v. St. Anthony etc. Co.*, 779.)

3. **CHATTEL MORTGAGES—COMPETENCY OF SUBSCRIBING WITNESSES TO—EFFECT AS NOTICE.**—If two witnesses are required to a chattel mortgage, the filing of such mortgage witnessed only by the mortgagee and one other person does not give constructive notice of its existence. (*Donovan v. St. Anthony etc. Co.*, 779.)

See Fixtures, 2; Liens, 1.

CITY COUNCIL.

See Mandamus, 3.

CIVIL DEATH.

1. **STATUTES—LIMITING PROVISIONS—EFFECT OF, UPON MAIN ACT.**—If a statute declares that "a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead," limitations upon such statute, that the convict shall not thereby be rendered incompetent as a witness, and that his person shall still be under the protection of the law, authorize the conclusion that those are the only cases in which it is not to be applied. The convict's civil death, therefore, destroys every civil right not enumerated in such limitations. (*Estate of Donnelly*, 62.)

2. **DESCENT — INHERITANCE — LIFE CONVICT -- RIGHT OF.**—A sentence of a person to imprisonment in the state prison for life, under a statute which provides that, after such sentence, the convict shall be "deemed civilly dead," extinguishes his civil rights, including the right of inheritance. He cannot, therefore, be a distributee of an estate to which he would otherwise be an heir. (*Estate of Donnelly*, 62.)

3. CIVIL DEATH IMPORTS A DEPRIVATION of all rights whose exercise, or enjoyment, depends upon some provision of positive law. (*Estate of Donnelly*, 62.)

CLOUD ON TITLE.

See Husband and Wife, 1.

COLLATERAL ATTACK.

See Judgments, 3; Trusts, 13.

COLLATERAL SECURITY.

See Negotiable Instruments, 10.

CONFESSIONS.

See Evidence, 1-5.

CONFLICT OF LAWS.

1. CONFLICT OF LAWS—PLACE OF CONTRACT.—Where a building and loan association, incorporated and having its principal place of business in one state, loans money to a resident of another state, secured by a mortgage on his real property therein, who executes a promissory note, which stipulates that it is understood to be made with reference to the laws of the former state, such stipulation is valid, and the transaction cannot be declared usurious when it is not so by the laws of the state wherein the association was incorporated. (*Hale v. Cairns*, 746.)

2. CONFLICT OF LAWS—ACTION FOR INJURY OCCURRING ON THE LORD'S DAY—DEFENSE.—If a person is prohibited, by statute, from recovering damages for an injury, caused by the negligence of another, to his person or team, while traveling, in one state, for pleasure, on the Lord's day, that is a good defense to an action brought in another state for such injury. (*Beacham v. Proprietors etc.*, 607.)

3. CONFLICT OF LAWS—LEX LOCI AND LEX FORI.—If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts the same as in contracts, in respect to the legal effect and incidents of acts. (*Beacham v. Proprietors etc.*, 607.)

See Adoption; Descent, 2; Insolvency; Insurance, 36.

CONSTITUTIONS.

1. CONSTITUTIONS—UNUSUAL PUNISHMENTS.—ARTICLE 8 of the amendments to the constitution of the United States, relating to cruel or unusual punishments, does not apply to the states. (*McDonald v. Commonwealth*, 293.)

2. CONSTITUTIONS.—ARTICLE 6 OF THE AMENDMENTS to the constitution of the United States does not apply to the states or to proceedings in state courts. (*McDonald v. Commonwealth*, 293.)

3. CONSTITUTIONAL LAW.—THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT of the constitution of the United States does not require that every person in the land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection is deemed equal if all persons in the same class are treated alike under like circumstances and conditions. The classification must, however, be based upon reasonable grounds. (*State v. Broadbelt*, 201.)

4. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—COSTS IN CRIMINAL CASES.—The words, "imprisoned for debt," in a state constitution, which provides that no person shall ever be imprisoned for debt, do not apply to criminal proceedings. Hence, as the costs in a criminal case, due to officers, are not a debt, but a part and parcel of the judgment, their payment may be legally enforced in the same way as the fine itself, that is by imprisonment, or otherwise, as provided by statute, without violating the constitutional prohibition against imprisonment for debt. (Ex parte Mann, 961.)

CONTEMPT.

CONTEMPT.—IMPRISONMENT FOR CONTEMPT IS NOT IN ANY JUST SENSE A PUNISHMENT; the object of such proceedings is to compel obedience on the part of the defendant to the decree of the court, and not to punish him as for a crime or a violation of law. (Frankel v. Frankel, 266.)

See Judgments, 10; Pardons, 12.

CONTRACTS.

1. CONTRACTS—CONSTRUCTION—DUTY OF COURT.—In the construction of contracts where there is no ambiguity, it is the duty of the court to determine their meaning, and where the terms and language of a contract are not disputed, its legal effect is a question of law to be determined by the court. (Sattler v. Hallock, 686.)

2. CONTRACTS—CONSTRUCTION—AMBIGUITY—INTERPRETATION BY PARTIES.—The construction of a contract is as much a part of it as anything else, and its interpretation by the parties is a consideration of importance. If a contract is indefinite or ambiguous, resort may be had to the surrounding facts and circumstances as they existed when it was made, to aid in its interpretation, and the practical construction given to it by the parties may also be considered. (Sattler v. Hallock, 686.)

3. CONTRACTS—CONSTRUCTION—INTENTION OF PARTIES.—It is always the duty of a court, in construing a written contract, to ascertain, if possible, the intention of the parties; and, in order to determine its proper construction, resort must be had to the contract as a whole, and effect must be given to every clause and part thereof, when it can be done without violence. (Sattler v. Hallock, 686.)

4. CONTRACTS—REPUGNANT CLAUSES.—Where the written and printed portions of a contract are repugnant to each other, the printed form must yield to the deliberate written expression. (Commonwealth etc. Co. v. Ellis, 816.)

5. CONTRACTS—GAMBLING—WHEN NOT.—A PURCHASE OF STOCK for speculation, made in good faith and contemplating actual delivery, is not a gambling transaction, and delivery may be postponed or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation. (Estate of Taylor, 812.)

6. CONTRACTS—GAMBLING—SALE OF STOCK.—An agreement for an actual sale and purchase of stock will make the transaction valid, though it originated in an intention merely to wager. (Estate of Taylor, 812.)

7. CONTRACTS—GAMBLING—DEALING IN STOCKS.—A purchase of stock for speculation is a mere wager on the rise and fall of prices, and hence a gambling transaction, if there was not,

under any circumstances, to be a delivery as part of and completing a purchase. (*Estate of Taylor*, 812.)

8. CONTRACTS—PENALTY FOR ACT—ILLEGALITY.—When a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it. (*Berka v. Woodward*, 31.)

9. CONTRACTS IN RESTRAINT OF TRADE are not favored in law, and are not to be extended by construction beyond the fair and natural import of the language used. (*Saddlery etc. Co. v. Hillsborough*, 569.)

10. CONTRACTS—RESTRAINT OF TRADE—AGREEMENT NOT TO SELL—TERMINATION OF.—If one sells goods, such as blankets, a stipulation in the agreement that the vendor will not sell like goods to anyone else in a certain locality, with no limitation as to time, terminates after the vendee has had a reasonable opportunity to dispose of the goods so purchased, in the usual course of trade. (*Saddlery etc. Co. v. Hillsborough*, 569.)

11. CONTRACT TO PREVENT CRIMINAL PROSECUTION IS VOID.—Instruments executed by a married woman, such as a promissory note, with a mortgage on real estate to secure it, and a chattel mortgage upon her household furniture and other personal property, the sole consideration of which is to prevent a criminal prosecution against her husband, are void. (*Davis v. Smith*, 584.)

12. CONTRACTS — VALIDITY — FORBIDDEN CONTRACTS INCLUDE IMPLIED CONTRACTS.—When a contract is expressly prohibited by law, no court will entertain an action upon it, or upon any asserted rights growing out of it, and this rule applies to implied as well as to express contracts. (*Berka v. Woodward*, 31.)

13. CONTRACTS OF PUBLIC OFFICERS—RECOVERY UPON A QUANTUM MERUIT OR QUANTUM VALEBAT.—In cases where the contracts of public officers, with their counties or municipalities, have not been expressly forbidden by law, the demands of public policy are sometimes held to be satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a quantum meruit or quantum valebat. This, however, is not true where the contract is malum in se, or is against the express prohibition of the law, as the law will not imply a promise to pay for benefits received under a contract expressly prohibited by law. (*Berka v. Woodward*, 31.)

See Conflict of Laws, 1; Guaranty, 1, 4; Husband and Wife, 2, 3; Infants, 8; Insurance, 5, 44; Limitation of Actions; Municipal Corporations, 5; Pleading, 2; Specific Performance, 2.

CONVERSION.

See Bailments, 3; Receivers, 2, 3.

CORPORATIONS.

1. CORPORATIONS—RIGHT OF MEMBERS TO MAINTAIN SUITS AGAINST.—The rule that a corporation, by its officers, is the proper party to maintain an action to protect its property and maintain its rights, and that, until the corporation refuses, or is unable, individuals have no right to litigate for it, has no application when the officers of the corporation are engaged in perpetrating a fraud upon its members and grossly mismanaging its affairs. In such case, individual members may maintain an action against the corporation and its officers. (*Pencille v. State Farmers' etc. Ins. Co.*, 326.)

2. CORPORATIONS—IMPLIED POWER TO LEVY ASSESSMENTS.—A corporation has no inherent power to assess for its own use a sum of money on the corporators, and compel them to pay it. Such power is derived only from an express promise, or from statute. (*Duluth Club v. Macdonald*, 344.)

3. CORPORATIONS—POWER OF OFFICER TO PROMISE SALARY.—A corporation is not bound by a promise made by its treasurer and director to a third party that such third party should be president at a stated salary, where such promise was never communicated to the other directors, and the corporate by-laws do not provide a salary for the president. (*Wood's Sons Co. v. Schaefer*, 305.)

4. CORPORATIONS—STOCKHOLDER'S LIEN ON INSURANCE MONEY.—Preferred stockholders holding a statutory lien on the property of the corporation, upon the destruction of such property by fire, have no lien upon the funds realized under policies of insurance. (*Heller v. National Bank*, 212.)

5. CORPORATIONS—PREFERRED STOCK—PRIORITY.—A STATUTE giving to preferred stock a "priority over any subsequently created mortgage or other encumbrance" gives a priority to such stock over all unsecured claims which subsequent mortgages, if created, would have preference over. (*Heller v. National Bank*, 212.)

6. CORPORATIONS — CAPITAL STOCK — WITHDRAWAL.—No part of the capital stock of a corporation can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are satisfied. (*Heller v. National Bank*, 212.)

7. CORPORATIONS — PREFERRED STOCK — STATUTE—PUBLIC POLICY.—A statute which authorizes corporations, instead of issuing bonds secured by mortgage for money borrowed, to issue preferred stock which "shall be and constitute a lien on the franchises and property of such corporation, and shall have priority over any subsequently created mortgage or other encumbrance," creates a valid lien on franchises and property of the corporation, and is not against public policy, since public policy in such a case is what the statute enacts. (*Heller v. National Bank*, 212.)

8. CORPORATIONS — PREFERRED STOCK — STATUTORY LIEN.—Ordinary preferred stock has no lien on the property of a corporation. But where a statute plainly gives a lie and preference, then such stock is not ordinary preferred stock, though it is so called and though it possesses many incidents in common with preferred stock. (*Heller v. National Bank*, 212.)

9. CORPORATIONS—PREFERRED STOCK—RIGHTS IN. Calling stock preferred stock does not per se define the rights in such stock, but these depend on the statute or contract under which it was issued. (*Heller v. National Bank*, 212.)

10. CORPORATIONS—PREFERRED STOCKHOLDERS.—As between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution of its assets, entitled to nothing until its creditors are first fully paid. (*Heller v. National Bank*, 212.)

11. CORPORATIONS — MANUFACTURING — STOCKHOLDER'S LIEN.—A lien given by statute to preferred stockholders in a manufacturing corporation upon the property of the corporation does not attach to articles manufactured for sale. (*Heller v. National Bank*, 212.)

12. CORPORATIONS—LIABILITY OF PRESIDENT—PARTIES.—Where a president has misappropriated corporate funds to a

partnership of which he is a member, the other partners are not necessary parties to an action brought by a stockholder against the executor of the president's estate to compel the estate to make good the amount of the misappropriation. (*Wineburgh v. United States etc. Co.*, 261.)

13. **CORPORATIONS—LIABILITY OF OFFICER—SURVIVAL OF ACTION.**—The liability of an officer of a corporation for misappropriation of corporate property by him while in office survives his death. (*Wineburgh v. United States etc. Co.*, 261.)

14. **CORPORATIONS—DOUBLE LIABILITY OF SHAREHOLDERS UPON THEIR GUARANTY.**—If some of the stockholders of a corporation personally guarantee the payment of advances made by a bank to the corporation, and do not mention their liability as shareholders, they are answerable, both as guarantors and as stockholders, to the amount of the corporate liability. Liability upon the guaranty does not excuse liability, in any amount, as stockholders; and, while they are not answerable for more than the corporate liability in either or both capacities, yet, where the judgment against them is less than the agreed amount of the corporate liability, it is not material in which capacity it was recovered. (*London etc. Bank v. Parrott*, 64.)

15. **FOREIGN CORPORATIONS.—EQUITY WILL TAKE JURISDICTION** of a suit brought by a stockholder against a foreign corporation and the executor of a former president, to compel the estate of such president to make good to the corporation the amount of alleged misappropriations of corporate property by him while in office. (*Wineburgh v. United States etc. Co.*, 261.)

16. **CORPORATIONS—INJUNCTION AGAINST FOREIGN.** The courts of a state cannot, by injunction, control the internal management of a corporation which is located beyond the reach of that process. (*Condon v. Mutual Reserve Assn.*, 169.)

17. **CORPORATIONS—FOREIGN—JURISDICTION.**—A statute providing that lawful process, served upon an agent of a foreign corporation authorized to receive such service, shall be of the same force and validity as if served on the corporation within the state does not confer jurisdiction to regulate the management, the conduct, or the internal government of such foreign corporation. (*Condon v. Mutual Reserve Assn.*, 169.)

18. **CORPORATIONS — FOREIGN — INTERNAL MANAGEMENT.**—Where the act complained of affects a party solely in his capacity as a member of the corporation, such action is the management of the internal affairs of the corporation, and, in case of a foreign corporation, the court will not take jurisdiction. (*Condon v. Mutual Reserve Assn.*, 169.)

19. **CORPORATIONS — FOREIGN — JURISDICTION OVER.** Where the act of a foreign corporation complained of affects a party's individual rights only, the courts of a state will take jurisdiction. (*Condon v. Mutual Reserve Assn.*, 169.)

20. **CORPORATIONS — FOREIGN—PLEADING — INTERNAL MANAGEMENT.**—A complaint, alleging that excessive assessments levied by a foreign insurance company are illegal and void because, the condition of the death fund not demanding that they should be laid, they were made with the fraudulent purpose of forcing the complainant's policy to lapse, states facts relating to the internal management of such foreign corporation, and the courts of this state will not entertain jurisdiction of it. (*Condon v. Mutual Reserve Assn.*, 169.)

21. **CORPORATIONS—FOREIGN—STATUTE CONFERRING JURISDICTION.**—A statute making a foreign corporation liable to

a suit "on any dealings or transactions" had in the state is to provide for the enforcement of contracts made here by foreign corporations through their agents, but does not confer jurisdiction over the internal affairs of a foreign corporation. (*Condon v. Mutual Reserve Assn.*, 169.)

22. CORPORATIONS—FOREIGN—JURISDICTION OVER INTERNAL MANAGEMENT.—Acts distinctively pertaining to the internal management of a foreign corporation will not be inquired into by the courts of a state, whatever the motives with which the acts are done, and the effect they may have upon others when done. (*Condon v. Mutual Reserve Assn.*, 169.)

See Limitation of Actions; Municipal Corporations.

COSTS.

See Constitutions, 4.

COURT-MARTIAL.

See Militia, 1.

COURTS.

1. COURTS—EFFECT OF ADJOURNMENT—RECONVENTION.—If an order is made adjourning court to a subsequent day in the term, and judicial proceedings are had in the interval, it is to be presumed that the court regularly reconvened, under a revocation and vacation of such order of adjournment. (*Green v. Morse*, 518.)

2. COURTS—EFFECT OF ADJOURNMENT.—An order adjourning court to a subsequent day in the term creates an intermission, but does not adjourn the term, and the court may revoke such order and reconvene before the time fixed thereby. (*Green v. Morse*, 518.)

3. COURTS OF UNITED STATES—DECISIONS OF.—Upon a question arising under the constitution of the United States, the state courts are bound by the decisions of the United States supreme court. (*Fox v. State*, 193.)

4. COURTS—STARE DECISIS—DOCTRINE OF.—While the maxim of stare decisis is strictly applied where titles to real estate have been acquired or commercial usages have been established under judicial decisions, yet where a decision contravenes, misunderstands, or misapplies the law, and a reversal will not disturb property rights or commercial usages, such a reversal becomes proper and necessary. (*Truxton v. Fait & Slagle Co.*, 81.)

See Associations; Contracts, 1; Justices of Peace 1, 2; Insurance, 43; Municipal Corporations, 1; Payment, 1; Specific Performance, 1.

CRIMINAL LAW.

1. CRIMINAL LAW—PRINCIPALS—WHO ARE—PLEADING. Under the statute of Texas, there is no division of principals in the commission of crime, but all are principals who are present and encourage or aid in the act; but neither at common law nor under that statute is it necessary to allege the facts relied upon to show a defendant to be a principal, although the offense may not have been actually committed by him, if he is a principal by reason of the part performed by him in the commission of the offense. (*Red v. State*, 965.)

2. CRIMINAL LAW—PRINCIPALS—INTENT—TEST OF CRIMINALITY.—The guilt of one who is present and aids or en-

courages the commission of a crime, and who is called, at common law, a principal in the second degree, is measured by the intent of the one actually committing the crime, where both have the same intent and purpose, but if the intent of the one who so aids or assists is a different criminal intent, he is guilty according to the intent with which he may have performed his part of the act. (*Red v. State*, 965.)

3. CRIMINAL LAW—PRINCIPALS OF DIFFERENT DEGREES.—At common law, principals in the commission of crime are of the first and second degree. A principal of the first degree is one who does the act, either in person or through an innocent agent, and a principal of the second degree is one who is present, lending his countenance, aid, encouragement, or other mental aid, while another does the act. (*Red v. State*, 965.)

4. CRIMINAL LAW—DISTURBING RELIGIOUS WORSHIP. AN INSTRUCTION, on the trial of a mere misdemeanor, such as willfully disturbing a congregation assembled for religious worship, which defines the word "willful" to mean "with evil intent, or without reasonable grounds for believing the act to be lawful," is sufficient without including the expression "legal malice" in the definition. (*Holmes v. State*, 921.)

5. CRIMINAL LAW—DISTURBING RELIGIOUS WORSHIP. EVIDENCE that a person was at a church door, cursing and swearing there with others, and disturbing the congregation therein assembled to the extent of breaking it up, is sufficient to support a conviction for the willful disturbance of religious worship, where the congregation were then and there conducting themselves in a lawful manner during the performance of services. (*Holmes v. State*, 921.)

6. CRIMINAL LAW—INTOXICATION AS DEFENSE.—Under a statute providing that "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act," a person accused and on trial for larceny is entitled to offer evidence to show his intoxicated condition at the time of the commission of the crime as bearing upon the existence of the element of intent. (*State v. Koerner*, 752.)

7. CRIMINAL LAW—EVIDENCE OF INTOXICATION—INTOXICATION AS DEFENSE.—If an offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, voluntary intoxication, as affecting the mental state of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent. In such cases, evidence of intoxication at the time when the crime was committed is admissible solely for the purpose of determining whether, in fact, the species or degree of crime charged has been committed by the accused and can never be considered by the jury to justify or excuse a crime which has in fact been committed. (*State v. Koerner*, 752.)

8. CRIMINAL LAW—VIOLATION OF STATUTE—EVIDENCE. To sustain a conviction, it is not only necessary for the prosecution to show that the accused has violated the spirit of the statute, but it must also show beyond a reasonable doubt that he has offended against the very spirit of the law. (*Bailey v. State*, 540.)

9. ALIBI—INSTRUCTION—DISPARAGING.—It is error to instruct the jury "that, though an alibi may be a well-worn defense, yet it is a legal one, to the benefit of which the defendant is en-

titled" as the court has no right to disparage such defense, or refer to it in a slighting or sneering manner. (*State v. Crowell*, 402.)

10. PROSECUTION FOR CRIME—AGREEMENT TO FOR-BEAR.—An agreement between a prosecuting officer and an accomplice in crime that, upon the latter's testifying against his accomplice, the prosecution against him is to be discharged cannot be enforced and is no bar to such prosecution. (*State v. Guild*, 395.)

11. CRIMINAL LAW—PROMISE OF IMMUNITY FROM PROSECUTION—WHO CAN MAKE.—The immunity which may be promised from the consequences of crime on condition of a full disclosure and readiness to testify are not a matter of right, but rest in the last resort on the sound judicial discretion of the court having final jurisdiction to sentence, and such a promise made by a police officer, without any authority from the district attorney, to one of two persons accused of a crime, cannot be pleaded in bar of an indictment against him for the crime. (*Commonwealth v. St. John*, 321.)

12. CRIMINAL LAW—PLEADING.—A plea which does not answer the whole indictment or all of the counts to which it is pleaded is defective. (*Fox v. State*, 193.)

See Assault; Accomplices; Burglary; Confession; Constitutions, 1, 4; Contracts, 11; Estoppel, 2; Evidence; Homicide; Incest; Instructions; Intoxicating Liquors; Larceny; Libel; Militia, 2; Pardons; Rape; Receiving Stolen Goods; Robbery; Statutes, 3-5; Trial; Witnesses.

CROSS-EXAMINATION.

See Appeal, 13.

DAMAGES.

1. DAMAGES—ALLEGATIONS AS TO, WHEN NOT NECESSARY.—In an action by a widow to recover damages for the wrongful killing of her husband, under a complaint showing that the deceased left surviving him a widow and minor children of tender years, no specific allegations showing that she or they suffered pecuniary damages by the loss of such life are required, in order to enable the plaintiff to recover. (*Haug v. Great Northern Ry. Co.*, 727.)

2. DAMAGES—BREACH OF CONTRACT IN RESTRAINT OF TRADE—LOSS OF PROFITS ON GOODS NOT INCLUDED IN CONTRACT.—If a seller agrees, in writing, not to sell like goods to anyone else in a certain locality, with no limitation as to time, the vendee cannot, in an action for breach of the contract, recover damages for a loss of profits on goods purchased subsequently to the execution of the written contract and not included in it. (*Saddlery etc. Co. v. Hillsborough*, 569.)

3. DAMAGES CAUSED BY INJUNCTION—HOW DETERMINED.—The question of the amount of damages caused to a prevailing defendant by a preliminary injunction is incidental to the principal issues, and should, upon the motion of either party, be determined by the court which heard the cause, without the aid of a jury. (*Carpenter v. Fisher*, 616.)

4. DAMAGES—EXEMPLARY—PLEADING.—A complaint setting forth a good cause of action for exemplary damages, and praying that a designated amount, as "exemplary damages," be awarded plaintiff, "as expenses of bringing these proceedings" is not vitiated by the latter phrase as that may be treated as mere surplusage. (*Jacobus v. Congregation etc.*, 141.)

5. RAILROAD COMPANIES—LIABILITY FOR DEATH FROM WRONGFUL ACT—EXPOSURE OF INTOXICATED PASSENGER TO DANGER.—If a railroad company negligently carries a passenger, known by it to be in an imbecile and helpless condition from intoxication, past his station and to the next station, where he is put off the train, against his wishes, late, on a dangerously cold and stormy night, at a place where there is no accommodation for passengers, except a depot, from which he is ejected by the company's agent into the night, while quietly waiting for a train to take him back to his destination, whereby his death is caused by exposure to the storm, the company is liable to his widow for his death. (*Haug v. Great Northern Ry. Co.*, 727.)

6. DAMAGES—NEGLIGENCE CAUSING DEATH—EVIDENCE—POSSIBILITY OF FUTURE BENEFITS—CONJECTURES—SPECULATIONS.—In an action to recover damages for a death caused by the defendant's negligence, brought by a sister and brother of the deceased, all the parties being adults, the law simply measures the injury complained of by the loss it has caused, or will cause, in dollars and cents, and, where there is no proof of actual injury, the jury, in estimating the damages, are not at liberty to consider the mere possibility of future benefits to the complaining parties, but must be guided solely by the evidence introduced, and not indulge in conjectures or speculations not supported by the evidence. (*Burk v. Arcata etc. R. R. Co.*, 52.)

7. DAMAGES—NEGLIGENCE CAUSING DEATH—EVIDENCE—COLLATERAL HEIRS—PROBABLE LOSS.—In an action to recover damages for a death caused by the defendant's negligence, brought by a sister and brothers of the deceased, all the parties being adults, the plaintiffs cannot recover more than nominal damages without proof of probable loss. The mere fact that the plaintiffs are collateral heirs of the deceased is not evidence of probable loss, and, where there is no evidence of pecuniary damage, nominal damages only can be recovered. (*Burk v. Arcata etc. R. R. Co.*, 52.)

See Appeal, 15; Cemeteries, 1-3; Eminent Domain, 4-13; Insurance, 49; Setoff, 1-3; Trespass, 1, 2.

DEBT.

See Attachments, 2; Constitutions, 4; Executors and Administrators, 1-4, 9, 10, 12; Fraudulent Conveyances, 6, 8, 9; Husband and Wife, 1; Legacies.

DEBTOR AND CREDITOR.

1. DEBTOR AND CREDITOR—PROVISION FOR PAYMENT OF DEBT—INDEMNITY—RIGHTS OF CREDITOR.—A creditor, for the satisfaction of his debt, may, in equity, avail himself of any subsisting provision made by his insolvent debtor for its payment; and an appropriation or pledge of property by the debtor, for the purpose of indemnifying against the debt any person liable for it, is equitably equivalent to a provision for its payment. (*Hunt v. New Hampshire Fire etc. Assn.*, 602.)

2. DEBTOR AND CREDITOR.—PREFERENTIAL MORTGAGES AND SECURITIES given by an insolvent debtor are valid if free from fraud in fact, except in insolvency proceedings. (*Dyson v. St. Paul Nat. Bank*, 358.)

See Insurance, 24; Receivers, 3; Sales, 7.

DEEDS.

1. **DEEDS—DELIVERY—PLEADING.**—An allegation in a pleading that a deed was executed and recorded is equivalent to an allegation that it was delivered. (McReynolds v. Grubb, 448.)

2. **DEEDS—PRESUMPTION OF DELIVERY.**—If a deed is executed and recorded, no formal delivery is necessary, as delivery, in such case, is presumed. (McReynolds v. Grubb, 448.)

See Husband and Wife, 4-7; Infants, 1-3; Trusts, 1-3.

DEFINITIONS.

DEFINITIONS.—"DISGRACE" means cause of shame or reproach; that which dishonors; a state of ignominy, dishonor, or shame. (Slawson v. State, 914.)

"Boarder." (Meacham v. Galloway, 886.)

"Civil death." (Estate of Donnelly, 62.)

"Guaranty." (London etc. Bank v. Parrott, 64.)

"House." (Favro v. State, 950; Williamson v. State, 901.)

"Immediate notice." (Solomon v. Continental Ins. Co., 707.)

"Letter of credit." (London etc. Bank v. Parrott, 64.)

"Ordinary care." (Schmidt v. St. Louis R. R. Co., 380.)

DESCENT.

1. **THE RIGHT OF INHERITANCE** is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. (Estate of Donnelly, 62.)

2. **CONFLICT OF LAWS—DESCENT.**—If both the real and the personal estate of an intestate, as well as his domicile, at the time of his death, are within a state, the laws of such state must govern in the descent and distribution of all of his property. (Eddie v. Eddie, 765.)

See Civil Death, 2.

DEVISE.

See Wills, 1-6.

DISTURBING RELIGIOUS WORSHIP.

See Criminal Law, 4, 5.

DOMICILE.

See Marriage and Divorce, 1.

EJECTMENT.

EJECTMENT—TENANT FOR YEARS—HOLDING OVER—NOTICE.—The owner of agricultural lands may, without notice, maintain an action of ejectment against a tenant for years who holds over, without the plaintiff's consent, after the expiration of the term. (Kuhn v. Smith, 79.)

See Real Property.

ELECTIONS.

ELECTIONS—NOMINATION OF CANDIDATES—POWER OF CONVENTION TO DELEGATE NOMINATION TO COMMITTEE.—A political convention may delegate its power, and confer

upon a designated committee authority to nominate a candidate for office, who, when so nominated, is entitled to file a certificate of nomination in accordance with the election law, and, upon paying the prescribed fee, to have his name placed upon the official ballot and to be voted for as the regular nominee of the party represented by such convention. In such case, the certificate of nomination may be executed by the chairman and secretary of the nominating committee. (*White v. Sanderson*, 334.)

ELEVATORS.

See Landlord and Tenant, 1, 2.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—RAILROAD TAKING LAND OF GAS COMPANY.**—A railroad company will not be permitted to condemn for an additional track a portion of the land of a gas company necessary for the latter's present and future use, where such taking is merely for the convenience and economy of the railroad company. (*Scranton etc. Co. v. Northern etc. Co.*, 798.)

2. **EMINENT DOMAIN.—A FRANCHISE IS PROPERTY**, and, as such, may be taken by a corporation having the right of eminent domain. (*Scranton etc. Co. v. Northern etc. Co.*, 798.)

3. **EMINENT DOMAIN—TAKING PROPERTY ALREADY DEVOTED TO A PUBLIC USE.**—To justify the taking of a franchise by a corporation having the right of eminent domain, the necessity must not be simply a question of economy or convenience, but must arise from the very nature of things, and be so absolute that, without it, the grant itself will be defeated. (*Scranton etc. Co. v. Northern etc. Co.*, 798.)

4. **EMINENT DOMAIN—CHANGE IN GRADE OF STREET—DAMAGES FOR.**—Where property has been injured by a change in the grade of a street, or other act, the damages which the owner is entitled to recover are the difference between the value of the property immediately before and immediately after the injury is inflicted. (*Philadelphia Ball Club v. Philadelphia*, 835.)

5. **EMINENT DOMAIN—DAMAGES—FUTURE PROFITS.** Where property is taken or injured under the power of eminent domain, consequential or speculative damages cannot be allowed, and future profits of the plaintiff's business are not to be considered for any purpose whatever. (*Philadelphia Ball Club v. Philadelphia*, 835.)

6. **EMINENT DOMAIN—DAMAGES FOR DELAY IN PAYMENT.**—Where the claim for damages to property under the power of eminent domain is so excessive and unreasonable as to justify the defendant in refusing to pay, no allowance can be made for damages by reason of a delay in payment, since the delay is due solely to the unreasonable demands of the plaintiff. (*Philadelphia Ball Club v. Philadelphia*, 835.)

7. **EMINENT DOMAIN—DAMAGES—FUTURE EXPENSES.** In estimating damage caused to property under the power of eminent domain, no consideration can be given to circumstances occurring after the completion of the injury; hence, in a proceeding to recover damages to a baseball park caused by a change in the grade of a street, the jury cannot take into consideration estimated annual profits, or the cost of changes and improvements made in the park three years after the street had been graded. (*Philadelphia Ball Club v. Philadelphia*, 835.)

8. EMINENT DOMAIN—DAMAGES TO SEPARATE PIECES OF PROPERTY.—Where a person owns property abutting on a street upon which a public improvement is being made, and later acquires property adjoining the first piece, but abutting on other streets, which property is used separately and distinctly from the first piece, the two properties will not be considered as one in a proceeding to assess damages for injuries caused by the erection of the public improvement, and damages will be confined to the property fronting on the street upon which the improvement is being made. (*Gibson v. Fifth Ave. etc. Bridge Co.*, 795.)

9. EMINENT DOMAIN—MEASURE OF DAMAGES—UNLAWFUL USE.—If, in estimating the value of property taken for a public use, it is shown that its rental value has been inflated by an unlawful use, such rental value, to the extent of the inflation, must be discarded as evidence of the value of the property. (*McKinney v. Nashville*, 859.)

10. EMINENT DOMAIN—MEASURE OF DAMAGES.—In estimating the value of property taken for a public use, it is the market value which is to be considered, and, in estimating such value, all of the capabilities of the property and all of the legitimate uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in and the use to which it is at the time applied by the owner. (*McKinney v. Nashville*, 859.)

11. EMINENT DOMAIN—DAMAGES—WHO MAY RECOVER. A petition to assess damages to land by the diversion of the water supply, caused by taking an easement in the land for the construction of a sewer, may be maintained by the owner after he has conveyed the premises, and after his vendee has recovered damages for the taking of the easement, where the damages occasioned by the diversion of the water were excepted from the conveyance. (*Penney v. Commonwealth*, 312.)

12. EMINENT DOMAIN—DAMAGES RECOVERABLE.—Where an easement in land is taken, under a statute which provides that all damages sustained by any person by the taking of his land shall be paid for, the amount in damages is not limited to the value of the land or easement taken, but damages to the remaining land, such as the destruction of crops and the drainage of wells in the construction of the work for which the land is taken, can be recovered, even though after the completion of the work the water returned to the soil and the wells as it was before, and the damage was only temporary. (*Penney v. Commonwealth*, 312.)

13. EMINENT DOMAIN—DAMAGES.—Under a statute allowing all the damages done to a party by reason of sewer improvements, whether any of his property is taken or not, injury to a landowner by draining his well may be recovered for. (*Bickford v. Hyde Park*, 320.)

EQUITY.

EQUITY—RIGHT OF ONE TO ACT FOR MANY.—If the questions to be litigated are of common interest to a large number of persons, and it is impracticable to bring them all into court, one or more may proceed in equity for the benefit of all. (*Pencille v. State Farmers' etc. Ins. Co.*, 326.)

See Appeal, 7; Corporations, 15; Husband and Wife, 13; Negotiable Instruments, 7.

ESTOPPEL.

1. ESTOPPEL BY NEGLIGENCE.—A person is not estopped by negligence, as a matter of law, from asserting his ownership of

bonds, which he has intrusted, for safekeeping only, to brokers whose business it is to buy and sell securities, where the bonds were not intrusted to them in that capacity, and where a sale by the brokers could only be accomplished through the commission of a felony. (*Scollans v. Rollins*, 284.)

2. **CRIMINAL LAW—ESTOPPEL.**—The prosecution, in a criminal case, cannot invoke against the accused the doctrine of estoppel. (*Bailey v. State*, 540.)

See Husband and Wife, 7; Infants, 6; Insurance, 27, 29, 46; Negotiable Instruments, 1, 2, 8; Vendor and Purchaser, 7.

EVIDENCE.

1. **EVIDENCE—CONFESSION OF A CRIMINATIVE CHARACTER—PROPER WARNING—ISSUE OF INSANITY.**—A confession or statement of a defendant, while in jail, may be given in evidence against him on the issue of insanity, regardless of any previous warning that what he says may be used in evidence against him, except where the confession or statement is of a criminative character in connection with the crime for which he is to be tried, in which case the confession or statement cannot be used against the defendant in the absence of a proper warning. (*Barth v. State*, 935.)

2. **EVIDENCE—CONFESSIONS—PROPER WARNING—DOUBT AS TO TIME.**—A confession made by one under arrest is not admissible, though he was warned by the officer to whom the confession was made that it could be used against him, where it does not appear how long after such warning the confession was made, and that it might have been one, two, or three weeks, for it cannot be assumed, under such circumstances, that the defendant was, at the time he made the confession, impressed with the idea that what he then said could be used in evidence against him, or that he knew that he was then making it under the conditions that had previously been stated to him by the officer. (*Barth v. State*, 935.)

3. **EVIDENCE—CONFESSIONS—PROPER WARNING—NECESSITY OF.**—A confession made by a person under arrest is not admissible in evidence against him in the absence of a proper warning that it can be so used. The warning given must be in substantial compliance with the statute, though it is not necessary that the confession should immediately follow the warning. (*Barth v. State*, 935.)

4. **EVIDENCE—CONFESSIONS—PROPER WARNING—REASONABLE TIME.**—If a confession by one under arrest is not made directly after the warning given, of its legal effect, it must, to be admissible, be made within such reasonable time thereafter as to indicate that the defendant yet remembered and was impressed with such warning, and that he made the confession under a due apprehension of its legal effect, to wit, that it could be used in evidence against him. (*Barth v. State*, 935.)

5. **EVIDENCE—CONFESSION TO THIRD PARTY AFTER WARNING BY SHERIFF—ADMISSIBILITY OF.**—A confession made by one under arrest to a third party, long after a warning given by the sheriff to the defendant, that anything he might say could be used in evidence against him, is not admissible in evidence, where there was no other warning subsequent to that given by the officer, for the court cannot presume against the defendant that he then had the warning given him by the sheriff in mind, or that he knew that such warning was operative as to statements made by him to another person than the sheriff, who gave the caution. (*Barth v. State*, 935.)

6. EVIDENCE.—A PLEADING is not competent evidence, in favor of the party pleading, of the facts averred therein. (*Green v. Morse*, 518.)

7. EVIDENCE.—THE WRITTEN STATEMENT OF THE GRANTOR in a trust deed, made out of court long after the trustee had taken possession under the deed, is not competent evidence against the latter, nor is it admissible to discredit the evidence of a witness for the party offering it, in the absence of evidence showing that the witness made the statement as an artifice to entrap or mislead the party into calling such witness, nor unless this purpose is disclosed at the time when the offer is made. (*Fearey v. O'Neill*, 440.)

8. OLEOMARGARINE—EVIDENCE.—Where an indictment charges that the defendant kept and offered for sale impure and deleterious oleomargarine made in part out of acids and other deleterious substances, testimony is insufficient and is properly excluded which is offered to prove merely that the oleomargarine in question was an article of commerce in semblance and imitation of natural butter, that it was manufactured in another state out of animal fats and vegetable oils, that it was not sold as butter, but as oleomargarine. (*Fox v. State*, 193.)

See Appeal, 8; Burglary, 7; Criminal Law, 5-7; Damages, 7; Executors and Administrators, 2; Homicide, 3, 6, 8; Incest, 1, 3; Insurance, 38, 45; Judgment, 9; Receiving Stolen Goods, 1; Treaspass, 5, 6; Trial, 4, 6, 8; Wills, 7, 8, 13, 14.

EXECUTIONS.

1. EXECUTIONS AND ORDERS OF SALE.—JUDGMENTS DIRECTING SALE OF LAND by a sheriff need not be supplemented by a formal order of the clerk of court in order to give force and effect to such judgments. (*Bristol Sav. Bank v. Field*, 539.)

2. EXECUTIONS—SUPPLEMENTARY PROCEEDINGS.—AN AFFIDAVIT for an order for the examination of a judgment debtor and his debtors in aid of execution, is insufficient, and will not support such order when based solely on averments made upon information and belief, especially when the sources and grounds thereof are not disclosed. The facts in such an affidavit must be set forth by positive averments. (*Clarke v. Nebraska Nat. Bank*, 507.)

3. EXEMPTIONS—WIFE, WHEN ENTITLED TO.—If a husband and wife are supporting themselves and their children by their joint labors in cultivating the wife's farm and caring for the household, and neither of them has any other farm or grain, either has a legal right to claim from the grain or provisions so raised on her farm an amount necessary for the support of the family for one year under the provisions of a statute exempting from attachment or final process "the provisions for the debtor and his family necessary for one year's support, either provided or growing." (*Boelter v. Klossner*, 347.)

4. EXECUTIONS—AMENDMENT.—Plaintiff in execution in a claim case cannot, as a matter of right, have the trial suspended in order to allow him to amend his execution. An application to that effect is addressed to the sound discretion of the presiding judge. (*Smith v. Bell*, 151.)

5. EXECUTIONS—AMENDMENT.—An execution, regular in all respects except that no person is named therein as plaintiff in the judgment upon which it is issued, is not absolutely void, but merely irregular, and the officer issuing may amend it by inserting the name of the plaintiff, and such amendment will not vitiate the levy. (*Smith v. Bell*, 151.)

6. SHERIFF'S DEEDS—REGULARITY.—A sheriff's deed, executed after confirmation of sale and before supersedeas of that order, and delivered after judgment of affirmance and filing of a mandate, is regular. (*Green v. Morse*, 518.)

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—DEBT DUE FROM ADMINISTRATOR—FINAL ACCOUNT—DECREE.—THE PROPER FORM of a decree settling the final account of an administrator, who owed a debt to the decedent, but which, through the administrator's insolvency and inability to pay, has, without any fault of his, not been collected, is to charge the administrator with all moneys coming into his hands, including the debt due from himself, and then designate what portion of the entire sum consists of personal debts due the estate from the administrator, reported by him as cash on hand. This would protect the administrator, and the heirs could still proceed against him to collect the amount of his debt, if he acquires the means to pay it. (*Estate of Walker*, 40.)

2. EXECUTORS AND ADMINISTRATORS—DEBT OF INSOLVENT ADMINISTRATOR—FINAL ACCOUNT—EVIDENCE.—Upon the settlement of the final account of an administrator, who owes a debt to the decedent, there is no error in rejecting evidence that he has never, at any time, while administrator, had the means to pay the debt or any part thereof. The rights of the administrator, so far as to protect him against the consequences of charging him with the debt as money on hand, should be fixed by the decree settling the final account. (*Estate of Walker*, 40.)

3. FICTIONS OF LAW—DEBT OF ADMINISTRATOR.—The fiction of law that a debt of an administrator is to be considered as money on hand is based upon the supposed ability of the administrator to pay, and will not be allowed to work injustice against an insolvent administrator, by placing him in such a position that he might be charged with contempt or embezzlement for a failure to pay over moneys not received, and which he was unable to pay, or by charging his sureties with liability beyond the faithful discharge of the duties of the administrator. (*Estate of Walker*, 40.)

4. EXECUTORS AND ADMINISTRATORS—DEBT OF INSOLVENT ADMINISTRATOR—LIABILITY FOR.—An administrator is to be charged with a personal debt due from him to the decedent as money on hand, but he, as administrator, and his sureties, are not bound for the debt any further than the administrator has had the means to pay. Hence, if he has, at all times since his appointment, been unable to pay anything on the debt, they are not liable at all. (*Estate of Walker*, 40.)

5. EXECUTORS AND ADMINISTRATORS—LEGISLATIVE POWER TO AUTHORIZE SALE OF REAL ESTATE FOR BENEFIT OF HEIRS.—Upon the death of an ancestor, his heirs immediately have a vested right in his real property, subject only to liens or burdens then existing or created by law in force at the time; and, after the title has thus vested in the heirs, the legislature has no power to divest it by authorizing the administrator to sell the inheritance for the benefit of the heirs. (*Estate of Packer*, 58.)

6. EXECUTORS AND ADMINISTRATORS—DECREE AGAINST ADMINISTRATOR DE BONIS NON—SURETIES OF EXECUTOR—LIABILITY.—The sureties of an executor who dies before his account is settled are strangers to a decree made on the settlement of the account of an administrator de bonis non, and are not bound by such decree; and, as they are not bound by

It, neither is the administrator de bonis non bound by it, as against them. (Judge of Probate v. Sulloway, 619.)

7. **PLEADING—AMENDMENT—PARTY IN INTEREST.**—It is proper, even after a decree in probate proceedings, to permit an amendment naming one who has an equitable and beneficial interest in the subject matter of litigation as a party to the suit. (Judge of Probate v. Sulloway, 619.)

8. **EXECUTORS AND ADMINISTRATORS—SUIT ON BOND—PREREQUISITE.**—When a sum of money due to another from a deceased executor is admitted, a decree of the probate court that the amount be paid is not necessary to a suit on the bond of the executor's sureties. (Judge of Probate v. Sulloway, 619.)

9. **EXECUTORS AND ADMINISTRATORS—DECREE CHARGING EXECUTOR WITH PERSONAL DEBT TO DECEDENT—CONCLUSIVENESS OF.**—A decree of a probate court charging a person, as executor, with the amount of his personal indebtedness to the decedent is conclusive, both as against the principal and his sureties, until reversed upon appeal, and cannot be collaterally attacked. (Judge of Probate v. Sulloway, 619.)

10. **EXECUTORS AND ADMINISTRATORS—PERSONAL DEBT TO DECEDENT—SURETIES' LIABILITY FOR.**—After an executor has been charged, by a decree of the probate court, upon the settlement of his account, with a personal debt which he owed to the decedent, the sureties on the executor's bond are, under the statute of New Hampshire, answerable for the payment of the debt, notwithstanding the executor's insolvency or inability to pay it. (Judge of Probate v. Sulloway, 619.)

11. **EXECUTORS AND ADMINISTRATORS.—THE LIABILITY OF THE SURETIES** on an executor's bond is coextensive with that of the principal, and a decree of the probate which binds the principal is binding on the sureties. (Judge of Probate v. Sulloway, 619.)

12. **EXECUTORS AND ADMINISTRATORS—PERSONAL DEBT TO DECEDENT—COMMON-LAW RULE.**—Except as against creditors, an executor's indebtedness to the testator was, by the common law, released or extinguished. (Judge of Probate v. Sulloway, 619.)

13. **ADMINISTRATOR'S SALE—BID BY WIDOW.**—If at an administrator's sale of land, the auctioneer conducting the sale, on request of the administrator, cries a specific sum as being bid for the land by the widow of the intestate, who is not present, and, that being the highest bid, she becomes the purchaser, these facts do not afford the other heirs sufficient grounds to set aside the sale in the absence of specific allegations of fraud, or that any discretion was given the auctioneer, or that he was authorized to bid for the widow any other or different sum. (James v. Kelley, 135.)

EXEMPLARY DAMAGES.

See Damages, 4.

EXEMPTIONS.

See Attachments, 4; Executions, 3; Mechanics' Liens, 3; Taxes; Sheriffs, 2.

EX POST FACTO LAWS.

See Statutes, 4.

EXTRATERRITORIALITY.

See Jurisdiction.

FEDERAL COURTS.

See Judgments, 3, 4.

FICTIONS OF LAW.

See Executors and Administrators, 3; Maxima.

FINDINGS.

See Appeal, 14.

FIXTURES.

1. FIXTURES—MACHINERY.—INTENTION OF PARTIES is a controlling consideration in determining whether machinery placed on premises for trade purposes remains personalty or becomes a fixture, and, if the vendor and vendee agree that it shall remain personalty, it so remains, unless innocent purchasers acquire rights in reliance upon its apparent character as a fixture. (Edwards etc. Lumber Co. v. Rank, 514.)

2. FIXTURES—MACHINERY—CHATTEL MORTGAGES.—If a person purchases machinery and places it upon his premises, executing a chattel mortgage on such machinery to secure the payment of a portion of the purchase price, he thereby evinces his intention that such machinery shall remain personalty, though physically attached to the premises, and it must be so regarded by the courts, as against mechanics', mortgage, or other liens, and whenever the right of innocent third persons are not prejudiced thereby. (Edwards etc. Lumber Co. v. Rank, 514.)

FORCIBLE ENTRY AND DETAINER.

1. FORCIBLE ENTRY AND DETAINER.—JURISDICTION of forcible entry and detainer proceedings is not ousted by a mere averment in an answer that such proceedings involve the question of title. The court has jurisdiction to proceed until the evidence discloses the fact that the title is involved. (Green v. Morse, 518.)

2. FORCIBLE ENTRY AND DETAINER—WRIT OF ASSISTANCE—INJUNCTION.—The remedies by forcible entry and detainer and by writ of assistance in the original case are concurrent; and an injunction cannot be issued to restrain a proceeding in forcible entry and detainer merely because the court may proceed by writ of assistance. (Green v. Morse, 518.)

3. FORCIBLE ENTRY AND DETAINER.—A PURCHASER AT JUDICIAL SALE may maintain an action of forcible entry and detainer to recover possession of the property purchased when the judgment debtor was in possession at the time the judgment was rendered under which the sale was made. (Green v. Morse, 518.)

FORMER JEOPARDY.

See Trial, 8.

FRAUD.

FRAUD.—PLEADINGS must state specifically the facts upon which fraud is founded. General charges of fraud cannot be considered. (James v. Kelley, 135.)

See Judgments 3, 5-7; Infants, 3; Mortgages, 4; Sales, 5-7; Vendor and Purchaser, 6, 7.

FRAUDULENT CONVEYANCES.

1. SALE—CHANGE OF POSSESSION—FRAUDULENT.—

Where a brother and sister live on a farm, and the brother gives a bill of sale of all the personal property to his sister, there being no break in the possession, real or ostensible, such sale is fraudulent as to the brother's creditors, although there was no intent to defraud. (*Lehr v. Brodbeck*, 828.)

2. FRAUDULENT CONVEYANCES—EFFECT OF JUDGMENT.—

If a conveyance of property is attacked by creditors of the grantor as being fraudulent and void as to them, for the reason that it was made to hinder, delay, and defraud them, and the grantor and grantee are made parties to the action, a judgment merely reciting that such deed is null and void for the reasons alleged, and that it be delivered up and canceled, must be construed as declaring the deed to be null and void as to the complaining creditors and not as determining the invalidity of the deed as between the parties thereto. (*McDowell v. McMurria*, 155.)

3. HOMESTEADS—FRAUDULENT CONVEYANCES.—

A deed made to defraud creditors, though void as to them, is valid between the grantor and grantee, but the grantor cannot, after executing the conveyance, have the property set apart and exempted as a homestead. (*McDowell v. McMurria*, 155.)

4. FRAUDULENT CONVEYANCES—RENTS AND PROFITS.

If a conveyance is held to be fraudulent under a complaint praying for general relief, the rents and profits of the property conveyed go to the creditors who bring suit to set aside the conveyance. (*Lander v. Ziehr*, 456.)

5. FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE.—A voluntary deed by a husband to his wife, without any pecuniary consideration moving from her, is void as to all his existing creditors. (*Lander v. Ziehr*, 456.)

6. FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE—SUBSEQUENT CREDITORS.—If property is inherited by a husband during coverture, a voluntary conveyance thereof to his wife, with intent to contract debts, and a design to avoid their payment by the conveyance, is fraudulent and void as to subsequent creditors of the husband. Such fraud may be shown by prior debts, the insolvency of the debtor at the time of the conveyance, or, though solvent at that time, rendered insolvent by such conveyance, or a design or purpose to hinder, delay, and defraud those to whom he is about to become indebted. (*Lander v. Ziehr*, 456.)

7. FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE—INHERITED PROPERTY.—If property is inherited by the husband, or acquired by his means during coverture, a voluntary conveyance thereof to his wife is fraudulent as to all of his existing creditors. (*Lander v. Ziehr*, 456.)

8. FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS.—A voluntary conveyance, fraudulent as to existing creditors of the grantor, is not necessarily fraudulent per se as to his subsequent creditors, and whether it is fraudulent as to them is to be determined by all the circumstances. (*Lander v. Ziehr*, 456.)

9. FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS—CHANGING CREDITORS.—A mere change of creditors during the continuance of a debt does not relieve against a fraudulent conveyance. If the debtor pays off debts existing at the time of such conveyance, by borrowing an equal amount from subsequent creditors, the conveyance is void as to the latter, especially

when the transaction involves actual and intentional fraud. (*Lader v. Ziehr*, 456.)

GAMBLING.

See Contracts, 5-7.

GIFTS.

1. **GIFTS INTER VIVOS—RETENTION OF POSSESSION—REDELIVERY FOR SAFEKEEPING.**—After a gift inter vivos has been made complete by delivery, it is not necessary for the donee to retain possession of the property to make the gift effectual, but it may, without invalidating the gift, be redelivered to the donor, as the agent of the donee, for safekeeping. (*Gannon v. McGuire*, 694.)

2. **GIFTS INTER VIVOS—DELIVERY—WHAT IS SUFFICIENT.**—The essential element of a gift inter vivos is delivery, by the donor, of the subject of the gift with intent to at once vest title thereto in the donee, but the delivery may be in accordance with the nature of the thing given, provided the circumstances show that the donor intended to divest himself of title and possession. (*Gannon v. McGuire*, 694.)

3. **GIFTS INTER VIVOS—WORDS—PARTING WITH POSSESSION.**—Mere words of gift are not enough to create a gift inter vivos, for the owner must part with possession and control before the gift can take effect. (*Gannon v. McGuire*, 694.)

4. **GIFTS INTER VIVOS—MORTGAGE—POSSESSION—REDELIVERY FOR SAFEKEEPING.**—A finding of a complete gift inter vivos is justified by evidence that the owner of premises, after conveying them, and taking from the grantee a mortgage, with accompanying bond, delivered the bond and mortgage to the grantee with intent to part with the title and possession and to transfer both to the grantee; that the mortgagor accepted the instruments so returned to him; and that he then handed the papers back to the mortgagee for safekeeping. (*Gannon v. McGuire*, 694.)

GOODWILL.

See Partnership, 2.

GUARANTY.

1. **GUARANTY—CONTRACT OF—RULE OF CONSTRUCTION.**—Although a guarantor is entitled to stand upon the strict terms of his contract, it must be construed by the same rules which are applied in the construction of other written instruments. (*London etc. Bank v. Parrott*, 64.)

2. **GUARANTY AND LETTER OF CREDIT—WHAT IS—LIABILITY WITHOUT NOTICE.**—A written instrument, which is addressed to a bank, requesting it to give continued credit to a third person in a specified amount, which guarantees payment of such credit, to the extent specified, in certain proportions named, and which declares that the same shall be a continuing guaranty by each of the subscribers, in such proportions, until the credit given is fully paid, is both a letter of credit and an absolute guaranty, upon which the subscribers are answerable, without notice of the credit given, and without notice of the acceptance of the guaranty. (*London etc. Bank v. Parrott*, 64.)

3. **GUARANTY, ABSOLUTE—GUARANTY OF CREDIT—WHEN BINDING WITHOUT NOTICE.**—Under a statute which provides that an absolute guaranty is binding on the guarantor without notice of acceptance, a guaranty of credit requested of a bank for a third person, and which states that the signers "do hereby

severally guarantee the said credits," is binding without any notice of acceptance, for it is an absolute guaranty. (London etc. Bank v. Parrott, 64.)

4. GUARANTY—CONTRACT OF—TWO INTERPRETATIONS—CONSTRUCTION.—The language used by a guarantor must receive a fair and reasonable interpretation for the purpose of effecting the objects of the guaranty, but if it is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, he cannot dispute the right of the person to whom it is given to act upon either interpretation. (London etc. Bank v. Parrott, 64.)

5. GUARANTY—DISCHARGE OF GUARANTORS BY TAKING NOTE.—The taking of a promissory note from guarantors does not discharge them from their liability upon the guaranty unless the obligation guaranteed is thereby changed. Hence, if a bank, holding a written instrument which guarantees the credit, in any form, of a corporation, takes a promissory note from the corporation, before the limit of credit is reached, for the amount of its overdrafts, which note is payable one day after date, which is not delivered to the bank until after its date, and which is, therefore, payable immediately, and the bank gives the corporation credit on its account for such note simply for the purpose of closing the overdraft account, such note is evidence of the credit existing at the time it is given, but, as it does not give time to the debtor, it does not change the amount or character of the liability of the guarantors, and does not, therefore, discharge them. (London etc. Bank v. Parrott, 64.)

6. LIMITATIONS OF ACTIONS—LIABILITY OF GUARANTORS, AS STOCKHOLDERS, WHEN NOT BARRED.—If some of the stockholders of a corporation personally guarantee the payment of advances made by a bank to the corporation, and, after considerable advances have been made, the corporation gives the bank a note in acknowledgment of its indebtedness at the time, which note is given before the statute of limitations has run against the liability, and, after such note is given, an action is brought on the guaranty within the period prescribed by such statute, the liability of the guarantors, as stockholders, is not barred as the giving of the note prevented the bar of the statute, and preserved the liability until the maturity of the note. (London etc. Bank v. Parrott, 64.)

7. GUARANTY—CEASING OF LIABILITY.—If a corporation, having a continued, guaranteed credit with a bank to a certain amount, overdraws its account before the limit of credit is reached, and the bank takes a note from the corporation simply for the purpose of closing the overdraft account, and gives it credit therefor against the overdrafts, a statement in an agreed case, in an action upon the guaranty, that, after the time of such closing and delivery of the note, the company continued to make deposits and to check against the same, but that no "further" credit was asked by or given to, the company, does not mean that no credit was given after that time. The word "further," so used, is equivalent to "additional," and the statement simply means that no additional credit was asked or given. The liability of the guarantors did not, therefore, cease at that time. (London etc. Bank v. Parrott, 64.)

See Corporations, 14; Payment, 4, 6.

HOMESTEADS.

1. PROBATE HOMESTEADS—PURPOSE OF, AND RESPECTIVE RIGHTS OF WIDOW AND CHILDREN IN.—A probate homestead is for the benefit of minor children, if there are any, as well as for the surviving husband or wife; and the homestead right continues in favor of any one of the family for whom it was created

as long as he or she asserts it and remains in a position to assert it, that is, so long as he or she sees fit to continue the homestead as a family home. The surviving husband or wife may occupy it as such after the children have attained majority, but when the children arrive at majority their interest in the homestead as a homestead ceases, for they no longer constitute a part of the family, and whatever property rights they thereafter have in the land covered by the homestead are in the nature of those of remaindermen or reversioners. (*Moore v. Hoffman*, 27.)

2. PROBATE HOMESTEADS—TENANCY IN COMMON WITH WIDOW—GRANTEE OF CHILDREN'S INTEREST.—The rights of a probate homestead claimant cannot be affected by an instrument in writing to which such claimant is not a party. Hence, after such a homestead has been set apart to a widow and children, the grantee of the children, after they have arrived at the age of majority, cannot legally go into possession of the homestead as a tenant in common with the widow. Besides this, it would violate the very purpose for which homesteads are created, to permit the children, after majority, to sever or divert the homestead from full occupancy and enjoyment as a family home, so long as the widow sees fit to occupy it as such. (*Moore v. Hoffman*, 27.)

3. HOMESTEADS—JUDGMENT AGAINST BINDS BENEFICIARIES.—A homestead is in the nature of a trust estate, of which the head of the family is a trustee; and a judgment in a suit brought against him as the head of the family, to subject the homestead to the payment of a debt belonging to the class for the payment of which the homestead can be rendered liable, is binding upon the homestead beneficiaries, although they are not parties to the action. (*Wegman v. Irvine*, 109.)

4. HOMESTEADS—JUDGMENT AGAINST—BINDING EFFECT ON BENEFICIARIES.—The head of a family holding a homestead is the representative of the beneficiaries thereof, and a valid judgment against him in a suit relating to the homestead, binds the beneficiaries as well as himself, and is conclusive as to all of them. (*Wegman v. Irvine*, 109.)

5. HOMESTEADS—JUDGMENTS AGAINST.—If a creditor, knowing that his debtor is the head of a family occupying property as a homestead, brings an action to subject it to the payment of a debt for which such debtor alone is personally liable, the judgment rendered therein is not conclusive upon the beneficiaries of the homestead estate, unless they are sui juris and parties to the action, or consent to such judgment. (*Snelling v. American Freehold etc. Co.*, 160.)

6. HOMESTEADS—SALE UNDER MECHANICS' LIENS.—Under a constitutional provision that all property exempted by law from seizure and sale shall be liable to seizure and sale for any debt incurred to any person for work done or material furnished in the construction, repair, or improvement of such property, a homestead may be subjected to levy and sale on execution under an ordinary money judgment by a creditor or his assignee for a debt contracted for material furnished to erect a dwelling-house on the homestead. This remedy exists, although notes of the debtor may have been taken as evidence of the debt and renewed from time to time. (*Nickerson v. Crawford*, 354.)

See Fraudulent Conveyances, 3.

HOMICIDE.

1. HOMICIDE — MURDER — PRINCIPALS — INTENT — INSTRUCTIONS.—In a murder case, where the one who actually com-

mitted the crime may be guilty of one degree of felonious homicide, and the one who aided or abetted him may be guilty of another degree of felonious homicide, the case should be properly presented to the jury as to the person actually committing the offense, embracing his or her intent; and then the jury should be instructed that if the aider or abettor, knowing such intent of the actual committer of the crime, entered into it, and aided such doer, with some other intent on his part, of a greater or less degree, to find him guilty and assess his punishment accordingly. (Red v. State, 965.)

2. **HOMICIDE—MURDER—PRINCIPALS—INTENT—CONVICTION OF DIFFERENT DEGREES.**—It is competent, under an indictment charging several persons as principals in murder, to convict one of such principals of one degree of felonious homicide, and another of some other degree of felonious homicide, according to the intent with which such principals may have performed the particular act attributed to and proved against them. (Red v. State, 965.)

3. **HOMICIDE—EVIDENCE—RES GESTAE.**—It is competent to prove by a witness that shortly after a homicide a party other than the deceased or defendant had wounds upon his person and was bleeding. The person himself is a competent witness to show that he received the wounds from the defendant, at the time of the killing, and this, being a part of the *res gestae* of the homicide, is admissible. (Barth v. State, 935.)

4. **HOMICIDE—DEGREES—INSTRUCTIONS.**—In a murder case, it is always best, as a general rule, to give both degrees of murder in charge to the jury, no matter how atrocious the circumstances attending the homicide may be. (Barth v. State, 935.)

5. **HOMICIDE—MURDER—IRREGULAR VERDICT—EFFECT OF.**—If a jury, in a murder case, where the indictment charges murder in the first degree, find the defendant guilty as charged, without stating the degree of murder, as required by the statute, the verdict is irregular and erroneous, but not void, and, though it is ground for a reversal of the case and a new trial, it does not acquit the defendant of murder in the first degree. (Garza v. State, 927.)

6. **HOMICIDE—MURDER—EVIDENCE OF DEFENDANT'S IMPECUNIOSITY.**—It is competent for the prosecution, on a trial for murder committed in the perpetration of a robbery, to prove that the defendant, before the homicide, was in an impecunious condition, but that he afterward had money. (Garza v. State, 927.)

7. **HOMICIDE—MURDER FOR PURPOSE OF ROBBERY—INSTRUCTIONS.**—It is correct to charge the jury, in a murder case, that the killing was murder in the first degree, where the motive for the homicide was robbery. (Garza v. State, 927.)

8. **HOMICIDE—SON'S DEFENSE OF FATHER—EVIDENCE.** On a trial of a son for killing his father's antagonist while the father was acting in self-defense, previous acts of hostility and demonstrations, made by the deceased toward the father, and coming to the knowledge of the son, and decedent's conduct and demeanor toward the father, are admissible in evidence, as tending to show whether the son had reasonable grounds to believe that the deceased was making a deadly assault upon the father, and would kill him or do him great bodily harm, unless by some summary means he was prevented. In such case, it is error to reject testimony as to who was the aggressor in such previous difficulty and what demonstrations were made on that occasion by deceased, especially if they were seen by, or came to, the knowledge of the defendant. (Foster v. State, 855.)

9. HOMICIDE—RIGHT OF SON TO DEFEND FATHER.—If a son honestly believes, on reasonable grounds, that a deadly assault is being made on his father, who is fighting in self-defense, and that, owing to the superior power of his antagonist, he may be killed or receive great bodily harm as the result of such assault, it is the legal right of the son, as well as his filial duty, to interfere and prevent the killing or maiming of his father, and to use such means as are necessary, under all of the circumstances, to effect this purpose, and if, in so doing, he kills his father's antagonist, he is not guilty of murder in the second degree. In such case, the killing is justifiable. (*Foster v. State*, 855.)

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—MARRIAGE AS EXTINGUISHMENT OF DEBT—CLOUD ON TITLE.—The heir of a woman who has given a trust deed upon land to secure her debt to a man whom she subsequently marries need not, in order to remove the trust deed as a cloud upon the title to the land, pay the amount which the deed was executed to secure. In such case, the debt and trust deed are extinguished by such marriage. (*Schilling v. Darmody*, 892.)

2. HUSBAND AND WIFE—EFFECT OF MARRIAGE ON PREVIOUS CONTRACTS BETWEEN.—Contracts between husband and wife before marriage become, by their matrimonial union, utterly extinguished in the absence of express contract to the contrary. (*Schilling v. Darmody*, 892.)

3. HUSBAND AND WIFE—MARRIAGE, EFFECT OF ON PREVIOUS CONTRACTS—MORTGAGES.—If a man takes a mortgage from a woman, his subsequent marriage to her, in the absence of an express contract, operates of itself as a satisfaction of the mortgage debt and as a discharge and release of the mortgage. (*Schilling v. Darmody*, 892.)

4. DEEDS BY MARRIED WOMEN—REFORMATION.—A deed to land made by a married woman, and void because defectively executed by her, or because it does not describe the land intended to be conveyed, or because of her incompetency to contract in connection therewith, or for any other reason, cannot be corrected by a proceeding in equity, even though she has received and enjoys the consideration therefor. (*McReynolds v. Grubb*, 448.)

5. DEEDS BY MARRIED WOMEN—REFORMATION—RIGHT TO REGAIN POSSESSION.—In an action against a married woman to reform her void deed to land, for which she has received the consideration, she cannot recover the possession, though the suit fails. (*McReynolds v. Grubb*, 448.)

6. DEEDS BY MARRIED WOMEN—AFFIRMATION OF VOID.—A void deed executed by a married woman with regard to her land, the title to which she holds in fee, may be affirmed by her after she becomes discovert; but it must be done in writing and in the form prescribed by law. Her assent to it after coverture, or her parol adoption of it, or her expressions of a willingness to make it valid, or a new deed, do not make it valid. To have such effect it must be reacknowledged and delivered. (*McReynolds v. Grubb*, 448.)

7. DEEDS BY MARRIED WOMEN—ESTOPPEL.—In an action of ejectment by a married woman to recover the possession of land conveyed by her under a void deed, the grantee may defend on the ground that, by reason of the fact that she has received the consideration for the land, and has stood by and seen him making permanent and valuable improvements thereon, she is estopped to recover. (*McReynolds v. Grubb*, 448.)

8. **HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—OFFER TO RETURN.**—An offer of a husband to return and resume marital relations with his wife, when they are living separate under a mutual agreement, is not established by his uncorroborated testimony that he sent his friends to make such offer. (*Buttler v. Buttler*, 648.)

9. **HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—ENFORCEMENT—OFFER TO RESUME MARITAL RELATIONS.**—If husband and wife are living separate under a mutual agreement, his offer to return and resume marital relations with her, if duly proved, cannot defeat her right to recover in equity the arrears of payments due her under such agreement, while he retains the exclusive use and control of her property transferred to him by such agreement. (*Buttler v. Buttler*, 648.)

10. **HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—ENFORCEMENT BY WIFE.**—In a suit in equity brought by a wife against her husband to enforce a mutual agreement of separation between them, providing for payments of money by him for her separate support, founded upon a valuable consideration passing from her to him, the rules of evidence as applied in a court of law may be applied, and a defense which would be overruled at law may be overruled in such case in equity. (*Buttler v. Buttler*, 648.)

11. **HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION—ENFORCEMENT.**—If husband and wife are separated under a mutual agreement providing for the monthly payments of money by him for her separate support, in consideration of his becoming possessed of her property, payments accruing under such agreement may be decreed in equity on behalf of the wife, on the ground that the husband's possession of her property for the purpose of her support fastens upon him the duty and obligation to maintain her. In such case, the husband may be required to satisfy out of the income of his business and property any deficiency arising in the amounts received by him from her property, required to meet his agreed monthly payments to her. (*Buttler v. Buttler*, 648.)

12. **HUSBAND AND WIFE—AGREEMENTS FOR SEPARATION.**—While separation between husband and wife in pursuance of mutual articles of agreement cannot be enforced by a court of equity, because against the policy of the law, yet the court will not suffer a husband, who has become possessed of the property of his wife by virtue of such an agreement, to avail himself of his own wrong in order to free himself from the duty to maintain her. (*Buttler v. Buttler*, 648.)

13. **HUSBAND AND WIFE—SUITS BETWEEN.**—A SUIT IN EQUITY can be maintained by a wife against her husband to recover her separate property obtained from her by his fraud and coercion, but an action at law cannot. (*Frankel v. Frankel*, 266.)

14. **HUSBAND AND WIFE.**—A PROMISSORY NOTE signed by a wife, payable to the order of her husband, and indorsed by him together with other persons, is void at common law and under the Massachusetts statutes relating to married women, even though the note after indorsement is given to a person in payment of a debt of the wife to him. (*National Granite Bank v. Whicher*, 317.)

See **Fraudulent Conveyances**, 5-7; **Insurance**, 26.

INCEST.

1. **INCEST—EVIDENCE—RELATIONSHIP.**—The evidence as to the relationship of the parties, on a trial for incest, should be clear and unequivocal. (*Clark v. State*, 918.)

2. **INCEST—ILLEGITIMATE RELATIVES.**—The crime of incest can be committed between illegitimate relatives within the prohibited degree. (*Clark v. State*, 918.)

3. **INCEST—NECESSITY FOR CORROBORATION AS TO TESTIMONY OF PROSECUTRIX.**—An isolated act of copulation, testified to solely by the prosecutrix, on a trial for incest, will not support a conviction; and her statements to another person, on the next day, telling of the incestuous act, are not admissible to corroborate her. (*Clark v. State*, 918.)

4. **INCEST—NECESSITY OF INSTRUCTION AS TO TESTIMONY OF ACCOMPLICE.**—If it appears upon the trial of an indictment containing a count for incest and two counts for rape that the prosecutrix is the principal, if not the only, witness for the state as to the act of carnal intercourse; that she is the state's main witness as to her paternity; that she copulated with the defendant, who was her father; but that the act of carnal intercourse was with her consent, it is error for the court not to instruct the jury on accomplice testimony. (*Clark v. State*, 918.)

5. **INCEST—ACCOMPLICE.**—A female participant in incestuous intercourse, whose action is voluntary and uninfluenced by any element of coercion, either by force, fear, fraud, or undue influence is an accomplice in the crime of incest. (*State v. Kellar*, 776.)

6. **INCEST—ACCOMPLICE—WHEN QUESTION FOR JURY.** If the coercion of a female participant in incestuous intercourse is sought to be shown inferentially, the question whether or not she is an accomplice in the crime of incest is generally one of fact for the jury to determine. (*State v. Kellar*, 776.)

INDICTMENT.

INDICTMENT.—TO TEST THE QUESTION WHETHER AN INDICTMENT FOR ONE OFFENSE INCLUDES ANOTHER, where the offenses are of the same general character, the indictment for the one offense must contain all the essential elements of the other, otherwise the prosecution for the latter cannot be maintained. (*Long v. State*, 954.)

See Larceny, 5; Libel, 2-5; Receiving Stolen Goods, 3.

INFANTS.

1. **DEEDS OF MINORS—SETTING ASIDE—MISREPRESENTATIONS.**—A deed executed by a minor may be avoided by him upon his arriving at the age of majority, though he represented himself to be of age at the time of the execution of the deed, and thereby misled the other party to his disadvantage. (*Ridgeway v. Herbert*, 464.)

2. **DEEDS OF MINORS—DISAFFIRMANCE.**—Whether or not the maker of a deed and lease was a minor at the time of their execution, and whether he disaffirmed them after becoming of age, are issues in an action at law, triable by a jury. Whether such instruments were obtained by fraud is an issue in equity, triable by the chancellor. (*Ridgeway v. Herbert*, 464.)

3. **DEEDS OF MINORS—SETTING ASIDE—FRAUD.**—If a spendthrift minor of very dissipated habits, whose character is well known to the grantee, executes a conveyance of his life interest in land for a grossly inadequate consideration, which he wastes during his minority, he may, on arriving at the age of majority, have the conveyance set aside on the ground of fraud, without restoring the consideration. (*Ridgeway v. Herbert*, 464.)

4. DEEDS BY MINORS—SETTING ASIDE—WASTE OF CONSIDERATION.—If a minor executes a deed, receives the consideration, and wastes it, he may avoid the deed upon arriving at the age of majority without making restitution. (*Ridgeway v. Herbert*, 464.)

5. DEEDS OF MINORS—DISAFFIRMANCE.—If a minor executes a deed and wastes the consideration received therefor while he is a minor, the making of a deed to another person as soon as he arrives at the age of majority is a sufficient disaffirmance of the first deed. (*Ridgeway v. Herbert*, 464.)

6. DEEDS OF MINORS—SETTING ASIDE—ESTOPPEL.—If a minor brings suit to set aside his deed on the ground of fraud, and in his petition alleges that he was of age when it was executed, he is not thereby estopped in a subsequent suit from petitioning that such deed be set aside on the ground of his minority. (*Ridgeway v. Herbert*, 464.)

7. INFANTS—RESCISSION OF CONTRACT—ACCOUNTING FOR BENEFIT.—The privilege of infancy is to be used as a shield and not as a sword. Hence, an infant should not be allowed to rescind a contract, of which he has had the benefit, without accounting for such benefit or returning its equivalent. (*Rice v. Butler*, 703.)

8. INFANTS—PURCHASE ON INSTALLMENT PLAN—NATURE OF CONTRACT—ACTION FOR MONEY PAID.—If a bicycle is purchased by an infant, under a contract authorizing him to receive the wheel and to pay a part of the price upon delivery, the remainder to be paid in future weekly installments and the title to pass upon making all of the payments stipulated, the infant cannot, after having used the bicycle for a time and paid the accrued installments, return the wheel, before it is fully paid for, and maintain an action for a return of the money paid, upon the ground that the contract is executory. In its entirety, the contract is executory, but as to the payments made it is in a sense executed. (*Rice v. Butler*, 703.)

9. INFANTS—RETURN OF BICYCLE PURCHASED ON INSTALLMENT PLAN—ACCOUNTING FOR USE.—An infant who has purchased a bicycle on the installment plan, who uses it for a while and returns it before it is fully paid for, and who brings an action to rescind the contract and to recover the amount paid thereon, ought, in justice and in fairness, to account for the reasonable use or deterioration in the value of the wheel during the time intervening between its purchase and return, where there was no fraud on the part of the defendant in making the contract. (*Rice v. Butler*, 703.)

10. INFANTS—RETURN OF BICYCLE PURCHASED ON INSTALLMENT PLAN—VALUE OF USE—HOW DETERMINED. In determining the value of the use of a bicycle which an infant purchased on the installment plan, and who used it for a while, but returned it before it was fully paid for, such value must, in an action to rescind and to recover the payments made, be deemed, in the absence of wanton injury to the wheel, to include the deterioration in value, and the infant cannot recover when it is found that the use equaled the sum paid on the contract. (*Rice v. Butler*, 703.)

See Attorney and Client, 2; Negligence, 1.

INFORMATION.

See Assault, 5.

INJUNCTIONS.

See Corporations, 16; Damages, 3; Mortgages, 9; Trademarks, 2.

INNKEEPERS.

1. **INNKEEPERS—BOARDER, WHO IS.**—One who takes rooms in a hotel, in the quarters allotted to regular boarders, for himself, family, and his visitors, for two or three weeks at a special rate, is a boarder and not a guest. (*Meacham v. Galloway*, 886.)

2. **INNKEEPERS—DIFFERENCE BETWEEN GUESTS AND BOARDERS.**—A guest at a hotel or boarding-house is one who comes without bargain as to time or price and goes away at pleasure, paying only for the actual entertainment received. A boarder is one who stays for a definite length of time, at a specific price previously agreed upon. (*Meacham v. Galloway*, 886.)

3. **INNKEEPERS—LIABILITY FOR BOARDER'S GOODS.** An innkeeper is not liable for the loss, by theft or otherwise, of the baggage or goods of a boarder, unless resulting from the wrongful act of such innkeeper or his servants. (*Meacham v. Galloway*, 886.)

4. **INNKEEPERS—LIABILITY TO PERSONS ATTENDING A CLUB BANQUET.**—A person is not answerable, as an innkeeper, to those who are at his inn for some special purpose, not connected with passage or travel, and who lose their property there, not in the character of guests, but in the execution of a purpose distinct from their accommodation as such. Thus, if an innkeeper furnishes, in his dining-room, a banquet for a club, and a person who attends the banquet loses his hat there, the innkeeper is not answerable for it. (*Amey v. Winchester*, 614.)

INSANITY.

See Evidence, 1.

INSOLVENCY.

INSOLVENCY—DISCHARGE IN—ACTION ON JUDGMENT—CONFLICT OF LAWS.—A discharge in insolvency of a resident of one state will not bar an action against him upon a judgment recovered in another state by a resident thereof, upon a debt contracted there, where the action is brought by an ancillary administrator of the estate of the deceased judgment creditor, who is also a resident of such other state, but appointed in the state granting the discharge. (*Adams v. Batchelder*, 282.)

See Building and Loan Associations, 1, 2; Executors and Administrators, 2, 4; Liens, 3.

INSTRUCTIONS.

1. **CONSTITUTIONS—JURY TRIAL—INSTRUCTIONS.**—A constitutional provision that judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law, is not violated by a charge with respect to matters of fact which are neither controverted nor in issue, where such charge may aid in the proper elucidation or application of the legal principles involved. (*Truxton v. Fitt & Slagle Co.*, 81.)

2. **APPELLATE PRACTICE—FAILURE TO INSTRUCT** the jury in a civil case on propositions not requested by counsel does not constitute error available on appeal. (*Fearey v. O'Neill*, 440.)

3. **TRIAL—INSTRUCTIONS.**—It is not necessary that the meaning of an ordinary word, such as the word "fraudulent," should be defined in an instruction. (*Fearey v. O'Neill*, 440.)

4. **TRIAL—INSTRUCTIONS.**—The sufficiency or correctness of instructions must be gathered from them as a whole, and not by

critically separating them, and then attacking the detached sections in detail. (*Fearey v. O'Neill*, 440.)

5. TRIAL.—INSTRUCTIONS to the jury that if a witness on different occasions has given evidence on the same subject, and the statements of the witness on one occasion are different from those made on another, and no satisfactory reason is advanced therefor, the jury is justified in disregarding the whole of the witness' testimony as erroneous. The court can go no further than to instruct the jury that, if it believes from the evidence that any witness has willfully sworn falsely as to any material fact, the whole of his testimony may be disregarded. (*Schmidt v. St. Louis R. R. Co.*, 380.)

6. CONSTITUTIONAL LAW—CRIMINAL TRIAL—CHARGING JURY.—Where a judge, in his charge, neglects to instruct the jury in reference to a count charging the defendant with being a habitual criminal, and after the jury has returned a verdict of guilty on the other counts, he instructs them on the habitual criminal charge, on which they return a verdict of guilty also, such procedure is not unconstitutional nor prejudicial to the defendant. (*McDonald v. Commonwealth*, 293.)

See Criminal Law, 4, 9; Homicide, 4, 7; Incest, 4; Libel, 3; Railroad Companies, 1, 2; Robbery.

INSURANCE.

1. INSURANCE—WHAT CONSTITUTES—REVENUE FROM LAND.—A corporation undertaking to guarantee a fixed revenue per acre from farming land, and which contracts, for a specified consideration, to pay such fixed amount per acre for the crop grown upon such land, without regard to its value, is an insurance company. (*State v. Hogan*, 759.)

2. INSURANCE—AGENT, ACTING AS—WHEN CRIMINAL.—If a statute provides that any agent who acts for an insurance company in transacting the business of insurance without procuring a certificate of authority as therein specified shall be punished by a fine, a violation of such statute constitutes a crime amounting to a misdemeanor. (*State v. Hogan*, 759.)

3. INSURANCE. FIRE—NOTICE OF LOSS—SERVICE OF, WITHIN A REASONABLE TIME—WHAT IS.—If the defense to an action on an insurance policy, brought by the general assignee of the insured, is that the plaintiff omitted to give "immediate" notice of loss required by the policy, and it appears from the evidence that the policy was transferred before the fire to the plaintiff, who had no knowledge of its contents; that the plaintiff used due diligence to discover the policy, which had accidentally fallen behind a case of pigeon-holes in the plaintiff's office, and to ascertain what it required; that, notwithstanding such diligence, he obtained neither the policy nor any information that it required notice of loss until about fifty days after the fire; and, that a notice dated three days after obtaining possession of the policy, was prepared and served with due diligence, the company receiving it three days after its date—it cannot be held, as a matter of law, that the service of the notice of loss was not within a reasonable time, or that the defendant did not receive sufficient notice of the plaintiff's loss under the condition of its policy. (*Solomon v. Continental Ins. Co.*, 707.)

4. INSURANCE. FIRE—"IMMEDIATE" NOTICE OF LOSS.—If a notice of loss is required by an insurance policy to be "immediate," the requirement is met if the notice is given within a reasonable time and with due diligence under the circumstances of the case. "Immediate," like "forthwith," does not mean instantly. (*Solomon v. Continental Ins. Co.*, 707.)

5. INSURANCE—CONTRACT OF REINSURANCE—INDEMNITY.—An insurance contract is a contract of indemnity; and, by a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured. (*Hunt v. New Hampshire Fire etc. Assn.*, 602.)

6. INSURANCE—REINSURANCE—PAYMENT, IN CASE OF LOSS, MAY BE MADE TO INSURED.—In case of loss, a reinsuring company may lawfully pay it to the person insured. Hence, if a risk is reinsured for a reinsuring company, which becomes insolvent, the amount paid by the second reinsuring company, in case of loss, equitably belongs to the company first reinsured, where it has paid the loss, and the second reinsurers may, therefore, lawfully make payment to such company. (*Hunt v. New Hampshire Fire etc. Assn.*, 602.)

7. INSURANCE—REINSURANCE—EXTENT OF LIABILITY IN CASE OF LOSS.—If one-third of a risk is reinsured, and one-half of this, or one-sixth of the whole risk, is again reinsured for the first reinsuring company, which afterward becomes insolvent, the last reinsuring company is answerable, in case of loss, for the whole amount against which it indemnified; and not merely for one-half of the sum which the insolvent company may pay to its creditors. (*Hunt v. New Hampshire Fire etc. Assn.*, 602.)

8. INSURANCE—USE OF NAPHTHA BY TENANT—VOID POLICY.—If a policy of insurance provides that it shall be void if naphtha is used on the premises insured, the use of naphtha by a tenant of the insured invalidates the policy, so far as the insured is concerned, whether he knows of its use or not. (*Badger v. Platts*, 572.)

9. INSURANCE—PAYMENT, BY COMPANY, OF MORTGAGE DEBT—ASSIGNMENT—SUBROGATION—REDEMPTION.—When an insurance policy is payable, in case of loss, to a mortgagee, a stipulation therein that, when no liability exists as to the mortgagor, or owner, the company may pay the debt due to the mortgagee and take an assignment of the mortgage, binds an assignee of the policy. Such payment does not extinguish the debt and discharge the mortgage, but subrogates the insurance company to the mortgagee's right therein, and the mortgagee's assignment to the company of the debt and mortgage, and its assignment of them to another, vest in the latter a title thereto which he can enforce by foreclosure. Hence, one who has purchased the equity of redemption, and who has accepted an assignment of the policy to himself, cannot redeem without paying the whole debt to the one who holds it and the mortgage security. (*Badger v. Platts*, 572.)

10. INSURANCE—MORTGAGED PROPERTY—SUBROGATION.—If a mortgage is given to indemnify sureties, accompanied by the mortgagor's agreement to insure the mortgaged property for the benefit of such sureties, but he, disregarding the agreement, procures insurance in his own name, after which the property is destroyed, they, upon paying the debt for which they are sureties, become equitably entitled to the insurance, in preference to the mortgagor's assignee in insolvency. (*Aetna Ins. Co. v. Thompson*, 552.)

11. INSURANCE MONEY—ASSIGNEE'S RIGHT TO.—An assignee in insolvency stands in the same position as the insolvent debtor, and has no right to insurance money which could not be lawfully claimed by the latter. (*Aetna Ins. Co. v. Thompson*, 552.)

12. INSURANCE—MORTGAGED PROPERTY—SUBROGATION—MONEY—EQUITABLE LIEN.—If a mortgage is bound by

covenant, or otherwise, to insure the mortgaged premises for the security of the mortgagee, the latter has an equitable lien, to the extent of his interest in the property destroyed, upon the money due on a policy taken out by and payable to, the mortgagor. (*Aetna Ins. Co. v. Thompson*, 552.)

13. **INSURANCE, FIRE—NONOPERATION OF FACTORY—FORFEITURE.**—If the things insured are exclusively personal property, such as machinery and merchandise, a claim of forfeiture cannot be based on the ground of nonoperation of the plant, when the policy provides that, if the property insured is a "manufacturing establishment," its nonoperation without the consent of the insurer shall avoid the policy. (*Phenix Ins. Co. v. Holcombe*, 532.)

14. **INSURANCE—ALIENATION—SALE TO PARTNER.**—A sale of insured property by one partner to another is not within the meaning of an inhibition in the policy against a sale, transfer, or alienation of the insured property without the consent of the insurer. (*Phenix Ins. Co. v. Holcombe*, 532.)

15. **INSURANCE—KNOWLEDGE OF AGENT.**—If an insurance agent has the supervision and inspection of the insurer's risks, the latter must be charged with knowledge of any fact learned by such agent while engaged in the performance of his duty as such inspector. (*Phenix Ins. Co. v. Holcombe*, 532.)

16. **INSURANCE, FIRE—OTHER INSURANCE—WAIVER.**—Failure of an insurer to cancel its policy after receiving notice of a breach of the condition against additional insurance is evidence from which a waiver of the right of forfeiture may be inferred, especially when an attempted cancellation of the policy is based upon another ground of forfeiture. (*Phenix Ins. Co. v. Holcombe*, 532.)

17. **INSURANCE, FIRE—PLEADING.**—If a fire insurance policy contains a clause against other insurance without the written consent of the insurer, an answer, in an action on the policy, defectively alleging notice to the insurer that additional insurance has been obtained, must, after a trial on the merits, be liberally construed, so as to give effect to the evident intention of the pleader. (*Phenix Ins. Co. v. Holcombe*, 532.)

18. **INSURANCE—MUTUAL COMPANIES—LIMIT TO ASSESSMENTS.**—The reasonable limits of an assessment in a mutual insurance company upon policy-holders to meet losses must not be disregarded, or the officers of the company making such assessment will be condemned as having transcended their authority, and the assessment held illegal and invalid. Such officers must act judiciously, as well as honestly, when levying assessments, and, if they fail to do so, the courts may interfere in behalf of the injured parties. (*Pencil v. State Farmers' etc. Ins. Co.*, 326.)

19. **INSURANCE—ADMISSION OF LIABILITY—DEFENSE IN FAVOR OF THIRD PARTY.**—If, in an action on an insurance policy, the company admits its liability, the plaintiff cannot set up, against one who has established a trust in his favor in the proceeds of the policy, any defense arising out of the by-laws of the company. (*Kendrick v. Ray*, 289.)

20. **INSURANCE MONEY—RIGHT OF LIENHOLDER TO.**—A policy of insurance against loss by fire is a personal contract of indemnity, which does not attach to the realty or in any manner go therewith, unless there is some special stipulation to that effect between the insurer and the insured. Consequently, a mortgagee, or any other lien creditor, has no right to claim the benefit of a policy underwritten for the mortgagor or owner of the property, unless there is an express agreement permitting it. (*Heller v. National Bank*, 212.)

21. INSURANCE—CHANGE IN CONDITION OF PREMISES—NEGLIGENCE—QUESTION FOR JURY.—Under a policy of fire insurance providing that it shall be forfeited by any change in the use or condition of the insured premises increasing the degree of risk, the question whether or not there has been such negligent use of the insured property as to materially increase the risk and thus cause the loss, should be submitted to, and determined by, the jury, when the evidence is such as to raise a serious doubt. (*Adair v. Southern Mut. Ins. Co.*, 122.)

22. INSURANCE—CHANGE IN CONDITION OF PREMISES—NEGLIGENCE.—If a policy of fire insurance provides that it shall be forfeited by any change in the use or condition of the insured premises increasing the risk made, without due notice to the company, and a new agreement entered into, and the insured or one to whom he has intrusted the entire custody and control of the insured property by his negligent acts so changes the use and occupancy of the premises as to temporarily increase the risk without the consent of the company, it is not liable for a loss directly resulting as a consequence of such acts. (*Adair v. Southern Mut. Ins. Co.*, 122.)

23. INSURANCE—FIRE—CHANGE IN CONDITIONS OF PREMISES.—A provision in a policy of fire insurance that it shall be forfeited by any change in the use or condition of the insured premises increasing the degree of risk, unless due notice is given to the company and a new agreement is entered into, applies to changes of a permanent nature and not to mere temporary changes in the use of the premises. The mere temporary use of a threshing machine for a few hours on the premises where the insured property is located does not, of itself, work either a forfeiture or suspension of such policy. (*Adair v. Southern Mut. Ins. Co.*, 122.)

24. INSURANCE—LIFE—INSURABLE INTEREST.—A CREDITOR may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt with interest, and the cost of such insurance, with interest thereon during the period of the expectancy of life of the assured according to the Carlisle tables. (*Wheeland v. Atwood*, 803.)

25. INSURANCE—LIFE—ASSIGNMENT OF POLICY.—If a life insurance policy is in its inception a good faith policy, made for a legitimate, and not a speculative, purpose, it is assignable to anybody for a proper and lawful consideration. (*Wheeland v. Atwood*, 803.)

26. INSURANCE—LIFE—INSURABLE INTEREST.—A HUSBAND has such an insurable interest in the life of his wife that the assignment to him of a policy taken out in her name gives him a good absolute title thereto which he might dispose of for a lawful consideration; hence he may assign the same to his creditor in payment of his debt. (*Wheeland v. Atwood*, 803.)

27. INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—ESTOPPEL.—If the parties to a contract of life insurance agree that the policy-holder shall be entitled to participate in the distribution of the company's surplus, according to the methods and principles adopted by the company for the distribution of surplus, the policy-holder is bound by his contract, and cannot, after he has expressly ratified and accepted such methods and principles, maintain an action at law to recover a proportionate share of accumulated surplus over and above the amount of surplus distributed to the policy-holders, reserved by the company in accordance with its methods and principles for the distribution of surplus. (*Greeff v. Equitable Life Assur. Soc.*, 659.)

28. INSURANCE—LIFE—EQUITABLE SHARE OF SURPLUS—DISTRIBUTION—DISCRETION.—If the charter and policy of a defendant life insurance company do not require it to distribute its entire surplus among its policy-holders, but only to credit to each policy an equitable share of the surplus, after deducting an amount sufficient to cover all outstanding risks and obligations, the company has the right to retain out of the fund remaining in its hands, though denominated by it as "surplus," instead of a reserve fund, an amount sufficient to insure the security of its policy-holders in the future as well as present, and to cover any contingencies that may arise, or which may be fairly anticipated; and the question as to how much of the surplus shall be distributed to the policy-holders and how much shall be accumulated and retained for the security of the company, must be decided by its officers and managers, who are to exercise their discretion in determining it, and the courts will not interfere where there has been no bad faith, willful neglect, or abuse of discretion, for such determination must, *prima facie*, be regarded as an "equitable" apportionment of the surplus. (*Greeff v. Equitable Life Assur. Soc.*, 659.)

29. INSURANCE BY HUSBAND FOR WIFE'S BENEFIT—ACTION—PROPER PARTY PLAINTIFF.—The fact that a policy of insurance is for the benefit of the wife of the insured does not make her the insured. She has an equitable interest in the policy, but her husband is the proper party plaintiff in an action at law to recover premiums paid by him upon the policy. (*McDonald v. Metropolitan Ins. Co.*, 548.)

30. INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—APPROVAL OF ATTORNEY GENERAL.—Under a statute which prohibits any action for an accounting from being brought against a life insurance company, or any action against it which interferes with its business, except upon the application or approval of the attorney general, an action by a policy-holder to recover a proportionate share of the company's surplus, brought without such application or approval, cannot be maintained unless the facts stated are sufficient to entitle the plaintiff to recover in an action at law upon the policy as an instrument for the payment of money, or to recover against the defendant for a breach of its contract. (*Greeff v. Equitable Life Assur. Soc.*, 659.)

31. INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—PREREQUISITE—ASCERTAINMENT OF PROPORTION.—Under a contract of life insurance, which provides that the policy-holder shall be entitled to share in the distribution of the company's surplus, according to the methods and principles adopted by the company for the distribution of surplus, and under which only such proportion of the surplus as equitably belongs to the policy is to be credited to it and paid to the policy-holder, the proportion designated must be ascertained and determined before the policy-holder can maintain an action at law to recover any portion of the surplus. (*Greeff v. Equitable Life Assur. Soc.*, 659.)

32. INSURANCE—LIFE—ACTION TO RECOVER SHARE OF SURPLUS—CONDITION PRECEDENT—LEGAL TITLE.—In an action upon a contract of life insurance, which provides that the policy-holder shall be entitled to share in the distribution of the company's surplus, according to the methods and principles adopted by the company for the distribution of surplus, the policy-holder cannot recover a specific portion of the accumulated surplus held by the company without showing some legal title to, or interest in, the fund, and this is not shown by an allegation in his complaint that, if the fund is divided, as an amount in which he had an interest was previously divided, he would be entitled to receive the

sum mentioned in the complaint. (*Greeff v. Equitable Life Assur. Soc.*, 659.)

33. **INSURANCE—REMEDY WHERE BOTH INSURER AND INSURED ARE DECEIVED BY AGENT.**—When both parties to a contract of insurance act in good faith, but are alike deceived by reason of false representations of material facts, such as those concerning the plaintiff's business, made unwittingly on the applicant's part, but with full knowledge of the company's agent, the insured should, in an action for money had and received, be allowed to recover the premiums paid, less the value of the insurance enjoyed by him during the existence of the policy. (*McDonald v. Metropolitan Ins. Co.*, 548.)

34. **INSURANCE—UNAUTHORIZED ACTS OF AGENT—RATIFICATION—REPUDIATION.**—If an insurance company ratifies unauthorized acts of its agent, by issuing a policy, it is chargeable with his knowledge of material facts, and is bound to repudiate such acts in toto, or not at all. It cannot accept premiums and yet deny liability on the ground that its agent deceived the insurer as well as the insured in taking the application. (*McDonald v. Metropolitan Ins. Co.*, 548.)

35. **INSURANCE—WARRANTIES, WHAT ARE NOT.**—Statements by an applicant for life insurance, which by the terms of the policy are made part of the contract with the insurance company, are not to be regarded as warranties, unless the policy upon its face plainly declares that they shall be treated as such. (*Supreme Council etc. v. Brashears*, 244.)

36. **INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—CONFLICT OF LAWS.**—A statute of Massachusetts applying to mutual benefit associations incorporated in that state, and which provides that when any certificate of insurance is issued to a resident of that state no misrepresentations made by the assured shall be deemed material or defeat the certificate, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss, is applicable to a certificate of insurance issued to a nonresident, because in a purely mutual association all members must be treated alike. (*Supreme Council etc. v. Brashears*, 244.)

37. **INSURANCE—PRESUMPTION AS TO CAUSE OF DEATH.** The presumption is that the death of an insured person was due to natural causes, and where death resulted from a pistol shot wound the presumption is that the wound was the result of accident, so that the burden of proof is upon the defendant to show that it was not the result of accident. (*Supreme Council etc. v. Brashears*, 244.)

38. **INSURANCE—EVIDENCE TO PROVE SUICIDE.**—In an action on an insurance policy, a statement, not sworn to, signed by one as "acting coroner," that the death of the insured was a clear case of suicide, and which was sent by a local council of a benefit society of which the deceased was a member to the governing body, is not admissible in evidence either to prove the cause of death, since the statement is only an expression of the opinion of the person signing it, or as a representation made by the beneficiary. (*Supreme Council etc. v. Brashears*, 244.)

39. **INSURANCE.—A POLICY-HOLDER IN A MUTUAL INSURANCE ASSOCIATION** stands in a twofold relation toward the company. He is insurer and insured. (*Condon v. Mutual Reserve Assn.*, 169.)

40. **INSURANCE—CONTRACT OF.**—The constitution and by-laws form part of the agreement of insurance, whether mentioned or not. (*Condon v. Mutual Reserve Assn.*, 169.)

41. INSURANCE—RESCISSION OF CONTRACT FOR MISTAKE.—The holder of an insurance policy is not entitled to have his policy canceled and to recover the premiums paid merely because he failed to understand the provisions of the policy, the constitution, and the by-laws. (*Condon v. Mutual Reserve Assn.*, 169.)

42. INSURANCE—MUTUAL—ASSESSMENTS paid by a member of a mutual assessment insurance company to meet death losses are not assets of the company. (*Condon v. Mutual Reserve Assn.*, 169.)

43. INSURANCE—MUTUAL BENEFIT SOCIETIES—PROPERTY RIGHTS—POWER TO OUST COURTS OF JURISDICTION. A certificate of a benefit society, such as the Ancient Order of United Workmen, is, like a policy of insurance, evidence of a property right; and, while it is competent for the order to prescribe certain regulations concerning the disposition of such right by contract, it is not competent for the order to confer upon its internal judicatories the sole power of determining the fact and consequences of any disposition the member may make, or attempt to make of it. (*Grimbley v. Harrold*, 19.)

44. INSURANCE—MUTUAL BENEFIT SOCIETIES—CONTRACT OF MEMBER TO DISPOSE OF BENEFITS—EFFECT OF.—A valid contract, whereby a member of a benefit society, such as the Ancient Order of United Workmen, assumes to dispose of his interest in the beneficiary fund of the order, virtually the proceeds of a policy of life insurance, and agrees not to change the beneficiary, upon the consideration that the latter will pay all future dues and assessments, and take care of him, is effectual as against a subsequent attempt of the member to violate or annul the contract by changing the beneficiary, where the contract is not in conflict with the lawful conditions upon which the order grants the insurance. (*Grimbley v. Harrold*, 19.)

45. INSURANCE—MUTUAL BENEFIT SOCIETIES—ACTION ON CERTIFICATE BY BENEFICIARY—EVIDENCE.—In a controversy over the right to the proceeds of a benefit certificate, where the member agreed that the beneficiary named therein should receive the insurance, but afterward violated his contract by appointing another beneficiary, evidence that the beneficiary first named, in a suit brought by him, bestowed care on the member during his illness, and that this was part of the consideration for the agreement that such beneficiary should have the insurance, is relevant and admissible, though the complaint contains no allegation that such attentions were to be rendered. Such evidence tends to exhibit the relative situation of the parties toward each other, and to make more probable the matter which is averred, namely, that the beneficiary should, in consideration of the payment of the member's dues and assessments, receive the insurance. (*Grimbley v. Harrold*, 19.)

46. INSURANCE—MUTUAL BENEFIT SOCIETIES—EQUITABLE RIGHT TO PROCEEDS OF CERTIFICATE—ESTOPPEL. If a member of a benefit society, such as the Ancient Order of United Workmen, violates his contract with a beneficiary by changing the beneficiary, and demands a return of the certificate for the purpose of having the change made, which demand is refused, the second beneficiary does not have, as against the first beneficiary, a superior equitable right to receive the money; and the first beneficiary is not estopped by a failure to disclose to the second beneficiary particulars of which the latter did not inquire, where the second beneficiary knew, when the demand was made, that the first beneficiary held the certificate and denied the right of the member to deprive him of its benefits. (*Grimbley v. Harrold*, 19.)

47. INSURANCE—WARRANTIES—BURDEN OF PROOF.—

Where a policy of insurance provides that statements made by the assured in his application as to existing facts relating to his health and habits are to be regarded as warranties, the burden of proving their truth does not rest upon the plaintiff in a suit upon the policy, but upon the defendant who alleges a breach of them. (Supreme Council etc. v. Brashears, 244.)

48. INSURANCE—WHAT INCLUDED IN CONTRACT OF.—

The contract of membership in a mutual insurance association always includes the constitution and by-laws of the association, whether they are specially referred to in the contract or not. (Supreme Council etc. v. Brashears, 244.)

49. INSURANCE—DAMAGES.—In an action upon a benefit certificate the measure of damages is the sum stipulated in the benefit certificate, with interest at the discretion of the jury. (Supreme Council etc. v. Brashears, 244.)

See Corporations, 4; Trusts, 7.

INTEREST.

See Payment, 3.

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE—OCCUPATION TAX—UNCONSTITUTIONALITY.—A state statute which levies a tax upon the business and occupation of selling lightning rods, which are manufactured in one state and sold in another, upon orders taken by a traveling salesman, is violative of the federal constitution, as being a tax upon interstate commerce, and is therefore void. (Talbutt v. State, 903.)

2. INTERSTATE COMMERCE—POLICE POWER—SALE OF OLEOMARGARINE.—A state may pass all laws necessary to prevent deception and fraud in the sale, within its limits, of articles in whatever state manufactured or from whatever state imported or introduced. Hence a state may prohibit the sale of impure and deleterious oleomargarine, whether made in the state or elsewhere, and whether sold as butter or oleomargarine. (Fox v. State, 193.)

3. INTERSTATE COMMERCE—OLEOMARGARINE.—A state legislature cannot prohibit the importation and sale within the state of a pure article of commerce, so long as it remains in the original package. Hence a state cannot prohibit the importation and sale in the state of oleomargarine made in imitation and semblance of butter. (Fox v. State, 193.)

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—"FURNISHING"—WHAT IS NOT.—A carrier who transports intoxicating liquors under a contract to carry and deliver the goods to the consignee at their destination does not, by such transportation and delivery, violate a statute providing that it shall be unlawful "for any person to sell, either directly or indirectly, or furnish at any place of business, or any public place, by any device whatever, any intoxicating liquors." (Southern Exp. Co. v. State, 146.)

JUDGMENTS.

1. JUDGMENT—RENDITION OF.—Ordinarily, it is the duty of the court to render such judgment as, upon the whole record, the law requires, without regard to any request or want of request therefor. (Johnson v. White Mountain Creamery Assn., 610.)

2. JUDGMENT—CONCURRENT REMEDIES—PAYMENT OR SATISFACTION.—When a note is secured by mortgage, and the mortgagee pursues his separate remedies on the note and on the mortgage concurrently, the judgment in each case must be for the full amount of the note, though one payment or satisfaction will discharge both proceedings; and a partial payment or satisfaction upon either will discharge both judgments to the extent of the payment. (*Colby v. McClintock*, 557.)

3. JUDGMENTS OF FEDERAL COURTS—COLLATERAL ATTACK—FRAUD.—A judgment of a federal circuit court is not subject to collateral attack in a state court, but it may there be attacked by a direct proceeding in equity on the ground that it was procured through fraud. (*Wonderly v. Lafayette County*, 474.)

4. JUDGMENTS OF FEDERAL COURTS—PLEADING JURISDICTION.—In a suit in a state court praying for judgment upon a judgment of a federal circuit court, it is not necessary to set out facts to show that such federal court had jurisdiction, nor can such suit be defeated on a plea at law that it did not have jurisdiction. (*Wonderly v. Lafayette County*, 474.)

5. JUDGMENTS—SETTING ASIDE FOR FRAUD.—A state court of equity has jurisdiction to entertain a bill to set aside a judgment obtained by fraud in a federal court. (*Wonderly v. Lafayette County*, 474.)

6. JUDGMENTS—FRAUD AS AFFECTING.—A judgment is vitiated by the fraud of the plaintiff, whereby the defendant was prevented from making his defense, which rests in the peculiar knowledge of the plaintiff, who conceals it from the defendant. (*Wonderly v. Lafayette County*, 474.)

7. JUDGMENTS—FRAUD IN OBTAINING.—A false pretense that the nominal plaintiff in a federal court is the owner of bonds sued on, when made to give jurisdiction to that court on the ground of diverse citizenship of the parties, while the real plaintiff and defendant are citizens of the same state, constitutes a fraud which will render such judgment subject to attack in a state court of equity, if the real defendant is thereby deceived and prevented from making his defense. (*Wonderly v. Lafayette County*, 474.)

8. JUDGMENTS—ASSIGNMENT—EVIDENCE.—The noting of an assignment of a judgment on the margin of the record in a federal court is not competent evidence to prove the assignment in a state court. Nor can such assignment be proved by a certificate of acknowledgment taken before a clerk of a federal court in another state. (*Wonderly v. Lafayette County*, 474.)

9. JUDGMENTS—ACTION ON—EVIDENCE.—If, in an action on a judgment, the answer admits the rendition of the judgment, it is not necessary for plaintiff to introduce a transcript of the judgment in evidence. (*Wonderly v. Lafayette County*, 474.)

10. JUDGMENTS—ENFORCEMENT OF BY PUNISHMENT FOR CONTEMPT.—Judgments rendered by the court of ordinary against executors or administrators on citations to account to heirs involving mere money liabilities or indebtedness to them, and not any specific fund, are enforceable only by execution against property, and not by attachment against the person for contempt. (*Everett v. Sparks*, 107.)

11. JUDGMENTS AGAINST TRUSTEES—CONCLUSIVENESS AGAINST BENEFICIARIES.—If plaintiff, knowing that a trust estate is not liable, brings suit for the purpose of charging the trust property with the payment of a debt for which the trustee alone is personally liable, the judgment rendered therein is not conclusive

against the beneficiaries of the trust, unless they are *sui juris* and parties to the suit, or consent to the judgment. The conduct of plaintiff in such case is fraudulent. (*Snelling v. American Freehold etc. Co.*, 160.)

12. JUDGMENTS—VESTING TITLE IN WRONGDOER.—The mere taking of a money judgment by the principal against his agent for the value of goods wrongfully withheld by the agent does not operate to invest the agent with the title to such goods, or to a warrant issued in payment therefor. To consummate this, payment of the judgment is necessary. (*Gilman v. Gilby*, 791.)

13. JUDGMENT—MERGER.—A judgment on a note void for want of jurisdiction of the person of the defendant is not a bar to a subsequent action on the same note. (*Sackett v. Montgomery*, 522.)

See Appeals, 4; Executions, 1; Executors and Administrators, 9; Fraudulent Conveyances, 2; Homesteads, 3-5; Insolvency; Justices of the Peace, 1; Marriage and Divorce, 2; Mortgages, 9; Set-off, 3; Trespass, 4; Trusts, 6, 13.

JUDICIAL SALES.

See Forcible Entry and Detainer, 3; Mortgages, 8.

JURISDICTION.

JURISDICTION — EXTRATERRITORIAL.—A legislature has no power to authorize a court to exercise extraterritorial jurisdiction, and a statute, however comprehensive, will not be construed as conferring such jurisdiction. (*Condon v. Mutual Reserve Assn.*, 169.)

See Corporations, 15, 17, 19, 21, 22; Forcible Entry and Detainer, 1; Insurance, 43; Judgment, 4; Receivers, 1.

JURY TRIAL.

See Instructions, 1, 2; Trial, 1, 2.

JUSTICES OF THE PEACE.

1. JUSTICES OF THE PEACE—VOID JUDGMENTS.—A judgment of a justice of the peace is void, when it affirmatively appears therefrom that the court was held at a place where it could not lawfully sit. (*Hilson v. Kitchens*, 119.)

2. JUSTICES OF THE PEACE—PLACE OF HOLDING COURT.—A justice of the peace, after giving notice that his court will thereafter be held in a new place in some particular house or definite locality in a certain village, cannot, after holding court there, lawfully hold his court in any other house or locality in that village, without giving further notice of such change, as required by statute. (*Hilson v. Kitchens*, 119.)

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—LIABILITY OF LANDLORD TO STRANGER FALLING DOWN ELEVATORWAY.—A person is not on premises by invitation where, in response to a question, a tenant tells her if she will go straight ahead she might find out what she wishes to know, and the landlord is under no liability to such person beyond what he would be to every person not a trespasser. (*McCarvell v. Sawyer*, 318.)

2. LANDLORD AND TENANT—ELEVATORS—A PERSON IS NOT EXERCISING DUE CARE where she enters a strange build-

ing, walks along a passageway and through an open elevator door, even though she had never seen an elevator before, for an elevator entrance is peculiar and does not suggest an ordinary passageway. (*McCarvell v. Sawyer*, 318.)

3. **LANDLORD AND TENANT—TENANT FOR YEARS—WHO IS, AND HIS DUTY TO SURRENDER.**—One in possession of agricultural lands, under a lease for a definite, fixed period, is a tenant for years, and, upon the expiration of his term, it is his duty to move without notice. (*Kuhn v. Smith*, 79.)

4. **LANDLORD AND TENANT—TENANT AT WILL—WHO IS NOT—NOTICE.**—A tenant who remains in possession after the expiration of his lease without the consent of the landlord, does not thereby become a tenant at will, entitled to a thirty-day notice before he can be ejected. (*Kuhn v. Smith*, 79.)

See Ejectment; Insurance, 8.

LARCENY.

1. **LARCENY—THEFT FROM THE PERSON—WHAT IS.** The offense of theft from the person is complete where the property, such as money, is suddenly snatched from the hands of the owner, with intent to deprive him of its value, and reduced to possession, before he has time to make resistance, though he may have seen the perpetrator and have known of his act at the time of its commission. (*Clemmons v. State*, 923.)

2. **LARCENY—THEFT FROM THE PERSON—MANNER AND PLACE OF TAKING.**—A statute requiring that property shall be "privately" taken to constitute the offense of theft from the person refers to the manner of taking from the person, and not to the place at which the property was taken. Hence, such offense can be committed in a public place by snatching property, such as money, from the hands of the owner, without his consent, and with intent to deprive him of its value, and so suddenly as not to allow him time for resistance. (*Clemmons v. State*, 923.)

3. **LARCENY—THEFT FROM THE PERSON—ASPORTATION.**—It is not necessary that property stolen from the hands of a person should be carried away from the presence of the owner to constitute the offense of theft from the person. It is only required that the property stolen should have gone into the possession of the thief with intent to deprive the owner of its value. (*Clemmons v. State*, 923.)

4. **LARCENY—THEFT OF MULES—ALLEGATION AND PROOF AS TO OWNERSHIP AND POSSESSION.**—If an indictment for the theft of mules, belonging to a certain person, charges the possession to have been in him, the state must prove that fact. Hence, if the evidence shows that the mules had been left with another person, who looked after, salted, and fed them, and that the owner resided some distance from the farm upon and about which they ranged, an issue of possession is raised, and the defendant is entitled to an instruction that, if the jury believe that such other person had the care, custody, and control of the animals at the time they were stolen, they must acquit. (*Long v. State*, 954.)

5. **LARCENY—OFFENSES OF SAME GENERAL CHARACTER—CONVICTION FOR ONE UNDER INDICTMENT FOR ANOTHER.**—A general indictment for theft does not include a charge of willfully driving livestock from its accustomed range without the consent of the owner, for the reason, among others, that the punishment of the one offense is essentially different from that of the other. Hence, a conviction for the latter offense cannot be had under a general indictment for theft. (*Long v. State*, 954.)

LEASE.

See Liens, 1.

LEGACIES.

LEGACIES—POWER TO DEDUCT DEBTS OF LEGATEE
—STATUTE OF LIMITATIONS.—The probate court has power to deduct the debts of an insolvent legatee from the legacy bequeathed to him by the testator in the distribution of the estate, and in making such deduction it is immaterial whether or not such debts are barred by the statute of limitations. (*Lietman v. Lietman*, 374.)

LETTER OF CREDIT.

See Guaranty, 2.

LEX LOCI AND LEX FORI.

See Conflict of Laws, 3.

LIBEL.

1. **LIBEL—INNUENDO.**—**THE OFFICE of an innuendo, in an action for libel, is to aver a meaning of the language published.** (*Squires v. State*, 904.)

2. **LIBEL—INDICTMENT FOR—SUFFICIENCY OF.**—An indictment for libel, alleging that the publication of a certain instrument was libelous, under the statute, in two respects, namely, that the libelee, being a candidate for office was dishonest, and therefore unworthy of such office; and that he had been guilty of an act which, though not a penal offense, was disgraceful to him as a member of society, and which would naturally bring him into contempt among honorable persons, is sufficient, though it has no innuendo or explanatory allegations, if it contains allegations of inducement, and the instrument set out therein does not require any explanatory averment to ascertain its libelous character, or against whom directed. (*Squires v. State*, 904.)

3. **LIBEL—INDICTMENT FOR—INSTRUCTIONS.**—If an indictment for libel contains two propositions, one libelous and the other not, the former should be submitted to the jury, under appropriate instructions, but they should be instructed to ignore or disregard the latter proposition. (*Squires v. State*, 904.)

4. **LIBEL—INDICTMENT FOR—CHARGE OF DISHONESTY AGAINST CANDIDATE FOR OFFICE—WHEN INSUFFICIENT.** A publication concerning a candidate for office is not libelous unless there is an imputation of dishonesty such as goes to his personal integrity, and which renders him unfit to be trusted with official duties. Hence, an indictment for libel cannot be sustained where the matter charged is that the candidate was unfaithful to the party which had nominated him; and that, while he was such nominee, he was secretly conniving with an opposing party for its support, for this does not indicate such a want of personal honesty as would render him unworthy of holding an office, though it does suggest a want of such high moral principle as should actuate a party's standard bearer. (*Squires v. State*, 904.)

5. **LIBEL—INDICTMENT FOR—CHARGE OF DISGRACEFUL ACT BY CANDIDATE FOR OFFICE—WHEN SUFFICIENT.** A charge, in an indictment for libel, that the prosecutor, who was a candidate for office, had written and signed a secret circular, abnegating the principles of his own party, and professing a belief in the principles of an opposing party, and had sent the same

abroad to certain persons, thus treacherously seeking their support in his election, places him, if the circular was true, in the attitude of a hypocrite and a traitor. Such a charge is therefore a libel, for it is calculated to bring him into disgrace and reproach among gentlemen, and should justly subject him to the contempt of all honorable persons. (*Squires v. State*, 904.)

6. **LIBEL—NEWSPAPER PUBLICATIONS** of false and defamatory matter are not privileged merely because made in good faith as a matter of news. (*Trebby v. Transcript Pub. Co.*, 330.)

7. **LIBEL—MATTER PER SE LIBELOUS.**—A written publication characterizing one as a "disreputable person," and charging him with having maliciously published in a newspaper a known false report tending to injure the credit of the city in which he lives, is libelous per se, unless privileged or justified, and the jury must be so instructed. (*Trebby v. Transcript Pub. Co.*, 330.)

8. **LIBEL—PRIVILEGED COMMUNICATIONS.**—The publication in a newspaper of a nonofficial resolution of a city council, wholly outside the scope of its duty, and containing matter libelous per se, is not privileged, either absolutely or conditionally. (*Trebby v. Transcript Pub. Co.*, 330.)

9. **LIBEL—PRIVILEGED COMMUNICATIONS ARE** those made in good faith upon any subject matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, and which contains matter which but for the occasion upon which it is made, would be defamatory and actionable. (*Trebby v. Transcript Pub. Co.*, 330.)

10. **LIBEL BY NEWSPAPER—GOOD FAITH—MISTAKE.**—In an action to recover for a newspaper libel, the question of good faith of defendant, and whether the falsity of the published article was due to his mistake of the facts, is for the jury to determine, unless the evidence to establish the defense is undisputed, and there is no reasonable ground for drawing different conclusions therefrom. (*Gray v. Times Newspaper Co.*, 363.)

11. **LIBEL—THE RETRACTION OF A LIBELOUS NEWSPAPER ARTICLE** required by statute to constitute a defense, must clearly refer to and admit the publication of the article complained of, and directly, fully, and fairly, without any uncertainty, evasion or subterfuge, retract the alleged false and defamatory statements therein. (*Gray v. Times Newspaper Co.*, 363.)

12. **LIBEL—RETRACTION—BURDEN OF PROOF.**—If in an action for newspaper libel, the defense is, that the article was published in good faith, and that the defendant published a full and fair retraction as provided by statute, the burden of proof is upon him to establish such defense. (*Gray v. Times Newspaper Co.*, 363.)

13. **LIBEL BY NEWSPAPER—RETRACTION.**—If, in an action for newspaper libel, the defense of a retraction is set up, the question whether the published retraction was full and fair, as required by statute, is ordinarily one of law for the court. (*Gray v. Times Newspaper Co.*, 363.)

14. **LIBEL—RETRACTION—WHAT IS NOT.**—A published retraction of an original libelous newspaper article which does not refer thereto, nor admit, nor even suggest, that the defendant ever published it, or that he desires to or does retract it, or that he ever had any part in giving publication to the defamatory statements, is not a fair and full retraction, as required by statute, and is not a defense to an action for libel founded on the original libelous article nor does such retraction bar the recovery of compensatory damages. (*Gray v. Times Newspaper Co.*, 363.)

LIENS.

1. **LIENS—PRIORITY OF—LEASE AND CHATTEL MORTGAGE.**—A lien for rent created by lease to become operative against personal property afterward to be brought upon the leased premises, but not yet capable of description, because not segregated, from a stock of goods of which it forms a part, is inferior to the lien of a chattel mortgage on such property, executed after it was placed upon the premises, and with notice of the lien attempted to be created by the lease. (*New Lincoln Hotel Co. v. Shears*, 524.)

2. **LIEN ON RENTS FROM PROPERTY.**—A lien upon property does not attach to the rents derived from the property, unless specifically included. (*Heller v. National Bank*, 212.)

3. **LIENS—EFFECT OF INSOLVENCY ON.**—The insolvency of the mortgagor or debtor cannot operate to expand the lien held by mortgagee or creditor, because mere insolvency can, of itself, in no instance, amplify a lien, whose existence and extent depend wholly upon the terms of the contract creating the lien. (*Heller v. National Bank*, 212.)

See Corporations, 4, 8, 11; Insurance, 12, 20; Trusts, 6; Vendor and Purchaser, 3-5.

LIMITATIONS OF ACTIONS.

LIMITATIONS OF ACTIONS—CONTRACT WITH CORPORATION—SHAREHOLDER'S LIABILITY.—If a corporation employs an attorney at law to defend an action brought against it, its liability upon the contract is "created" when the services have been fully performed, and not at the time of the employment. Hence, where the liability of a shareholder in such corporation is dependent, under the statute, upon the amount of stock owned by him at the time the liability was "incurred," the liability of one who was a stockholder when the services in question were rendered, is not barred by the statute of limitations until the expiration of the statutory period from the time that the liability was created. (*Johnson v. Bank of Lake*, 17.)

See Guaranty, 6; Legacies; Rape, 3.

MANDAMUS.

1. **MANDAMUS TO CONTROL OFFICIAL DISCRETION.**—Mandamus does not lie to compel an officer to exercise his official discretion in favor of a claimant of exemptions and to turn over to him on demand his property seized under a writ of attachment. (*Oliver v. Wilson*, 784.)

2. **MANDAMUS TO CONTROL OFFICIAL DISCRETION.**—Mandamus does not lie to compel a ministerial officer to act in a particular manner in any case where the officer's action or nonaction depends upon the exercise of official discretion. (*Oliver v. Wilson*, 784.)

3. **MANDAMUS—CITY TREASURER—ILLEGAL DEMAND APPROVED BY CITY COUNCIL.**—The duty of a city treasurer is to pay only legal demands against his funds. He cannot, therefore, be compelled, by mandamus, to pay a warrant issued for the value of lumber and materials sold to the city by a member of the city council, although the demand has been allowed by the city council, for such a claim is not a legal one, and its allowance by the council does not give it any validity not otherwise possessed. (*Berka v. Woodward*, 31.)

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—CHANGE OF DOMICILE FOR DIVORCE PURPOSES.—To effect a change of domicile for the purpose of obtaining divorce, not only must the residence at the place chosen for the new domicile be actual, but to the factum of residence there must be added the *animus manendi*. (*Magowan v. Magowan*, 645.)

2. DIVORCE—CONCLUSIVENESS OF DECREE AS TO RESIDENCE.—If a plaintiff in an action for divorce is required by statute to have been a bona fide resident of the state in which the action is brought for a fixed period of time, in order to enable him or her to maintain the action, the ascertainment by the court of the fact of such residence necessarily precedes a consideration of the merits of the case, and the determination of that question is final, not only in the courts of that state, but in every other jurisdiction where the validity of the judgment comes in question, unless such determination has been procured by fraud, but, if it has been so procured, it is without extraterritorial effect, and the decree must be treated as void in another state. (*Magowan v. Magowan*, 645.)

See Parent and Child, 1.

MAXIMS.

FICTIONS OF LAW ARE INDULGED TO WHAT EXTENT —MAXIM.—All fictions of the law were created to enable the court to do justice. In *fictione juris semper aequitas existit*. But where the indulgence of a legal fiction will work injustice, its just limit has been found. A court will never allow it to work wrong and injustice. (*Estate of Walker*, 40.)

MECHANICS' LIENS.

1. MECHANIC'S LIEN — COVENANT AGAINST — REPUGNANT CLAUSES.—A clause in a building contract positively prohibiting all liens is valid, and is not repugnant to a further clause requiring the contractor to show by sufficient evidence that the premises are free of all liens before payments could be demanded, this latter clause being inserted only as a protection against possible liens which might be filed without regard to the contract. (*Commonwealth etc. Co. v. Ellis*, 816.)

2. MECHANIC'S LIEN—COVENANT AGAINST—WHO MAY FILE.—Under a clause in a contract which provides that no liens shall be filed "by any subcontractors, or any other person," the principal contractor is not entitled to file a lien. (*Commonwealth etc. Co. v. Ellis*, 816.)

3. EXEMPTIONS—LIENS FOR LABOR OR MATERIALS.—A constitutional provision that all property exempted by law from seizure and sale shall be liable to seizure and sale for any debt incurred to any person for work done or materials furnished in the construction, repair, or improvement of such property, is self-executing, and its direct effect is to make property which is exempt from seizure and sale for other debts liable for the debts enumerated to the same extent and in the same way as if no exemption law existed. (*Nickerson v. Crawford*, 354.)

4. LIENS—SUPPLIES AND LABOR—LOGGING OPERATIONS.—The lien of a person who performs labor and furnishes supplies in furtherance of a general lumbering operation of cutting and hauling logs is not limited to the particular logs drawn by his

own team, but may be enforced against those cut in the general logging operations, and not drawn by him. (*Hopkins v. Rays*, 554.)

See Homesteads, 6.

MERGER.

See Judgments, 13.

MILITIA.

1. **MILITIA—MILITARY CODE—COURT-MARTIAL—CONSTITUTIONAL LAW.**—The provisions of a state military code authorizing the trial, in times of peace, of members of the state militia by court-martial for a violation of the reasonable rules and regulations of such code, and their punishment, if found guilty, by fine or imprisonment, are constitutional and valid. (*State v. Wagener*, 369.)

2. **MILITIA—VIOLATION OF MILITARY CODE NOT CRIMINAL OFFENSE.**—The rules and regulations of the Minnesota military code are merely disciplinary in their nature, designed to secure higher efficiency in the military service, and a violation of them does not constitute a "criminal offense" within the protection and meaning of constitutional provisions requiring presentment or indictment by a grand jury in order to hold to answer for a criminal offense. (*State v. Wagener*, 369.)

3. **MILITIA—"TROOPS"—"STANDING ARMY."**—The active militia of the state, the members of which, when not engaged at stated periods in drilling or training for military duty, pursue their usual vocations subject to call for military duty when public exigencies require it, are neither "troops" within the meaning of article 1, section 10, of the federal constitution, nor a standing army within the meaning of section 14 of the bill of rights of the Minnesota state constitution. (*State v. Wagener*, 369.)

MISTAKE.

See Insurance, 41; Libel, 10.

MORTGAGES.

1. **MORTGAGE—PURCHASE MONEY—CHARACTER DISCLOSED ON ITS FACE.**—A lien, whether it be a mortgage or a judgment, need not disclose on its face that it is for purchase money, if, in point of fact, it was given for purchase money. (*Commonwealth etc. Co. v. Ellis*, 816.)

2. **MORTGAGE—PURCHASE MONEY.**—Where the delivery of a deed to the mortgagor and a delivery of the mortgage to the mortgagee are concurrent and simultaneous acts, and the money for which the mortgage was given was in actual fact a part of the purchase money paid for the property, such mortgage is a purchase money mortgage, and is entitled to priority in distribution. (*Commonwealth etc. Co. v. Ellis*, 816.)

3. **MORTGAGES—PAYMENT—REVESTING OF TITLE.**—The payment or satisfaction of a debt secured by mortgage operates, ipso facto, to revest the title in the mortgagor without a reconveyance. (*Schilling v. Darmody*, 892.)

4. **MORTGAGES—REDUCTION FOR FRAUDULENT REPRESENTATIONS.**—In an action to foreclose a purchase money mortgage, the mortgagor may claim a reduction of the mortgage debt if the quantity of the land covered by the mortgage has been fraudulently represented to be greater than that actually conveyed, and such representations have induced the purchase. Such defense

may be made by answer without a cross-bill. (McMichael v. Webster, 630.)

5. MORTGAGES — FORECLOSURE—WASTE — REDUCTION OF DEBT.—A mortgagee in possession as such may, by cross-bill on a bill to foreclose the mortgage, be compelled to account for waste of the mortgaged premises, and to submit to a reduction therefor from the mortgage debt. (McMichael v. Webster, 630.)

6. MORTGAGES—FORECLOSURE.—WASTE by a mortgagee while in possession, not as mortgagee, but in some other right, is not a defense to the foreclosure of a purchase money mortgage. (McMichael v. Webster, 630.)

7. MORTGAGES—FORECLOSURE—MANNER OF SALE.—If land has been mortgaged as one tract and subsequently platted or cut up into city lots, and some of the lots sold, the mortgagor cannot, in case of foreclosure, insist, as a matter of right, that the sale be of the lots as platted, and not of the entire tract. (Hanscom v. Meyer, 544.)

8. JUDICIAL SALES—REDEMPTION—RIGHTS TO RESIST. A purchaser at a mortgage foreclosure sale has the right to acquire absolute title to the land, unless it is redeemed within the time allowed by law, by one who has a right under the statute to redeem, and he cannot be deprived of this right by one who is not a lawful redemptioner: (Hughes v. Olson, 343.)

9. MORTGAGES—FORECLOSURE—RIGHT OF PURCHASER TO ENJOIN REDEMPTION UNDER VOID JUDGMENT.—A purchaser at a mortgage foreclosure sale has the right to enjoin a person from redeeming from such sale under a void judgment purporting to have been rendered in his favor against the mortgagor. (Hughes v. Olson, 343.)

See Debtor and Creditor, 2; Gifts, 4; Husband and Wife, 3; Insurance, 10-12; Vendor and Purchaser, 6.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—ORDINANCES — REASONABLENESS.—COURTS are not inclined to inquire into the reasonableness of ordinances passed under an express grant of power by the legislature, but, as to ordinances passed under the general powers of a city, courts will not hesitate to declare them void where they appear to be unreasonable. (Ex parte McCarver, 946.)

2. MUNICIPAL CORPORATIONS—"CURFEW" ORDINANCE—WHEN UNREASONABLE AND VOID.—A city ordinance declaring it to be unlawful for any person under twenty-one years of age to go upon the streets later than fifteen minutes after the ringing of what is called the "curfew bell," provided for by the ordinance, unless such person is accompanied by his or her parent or guardian, or is in search of the services of a physician, is not necessary to preserve the good order and morals of the community, but, on the contrary, is paternalistic and an invasion of the personal liberty of the citizen. Such legislation is unreasonable, and the ordinance is, therefore, illegal and void. (Ex parte McCarver, 946.)

3. MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF AGENTS, WHICH THE CITY HAS NO POWER TO AUTHORIZE. A city is not answerable, even for the acts of its agents or servants, or for their negligence, in the performance of acts which it has no power to authorize. (Gross v. Portsmouth, 586.)

4. MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF INDEPENDENT PERSONS.—A city is not answerable for injuries caused by the negligent construction of waterworks therein, by

an independent board of water commissioners, who are not the city's servants or agents, and whom the city cannot direct or control in the discharge of their duties. (*Gross v. Portsmouth*, 586.)

5. MUNICIPAL CORPORATIONS—FORBIDDEN CONTRACT—RECOVERY UPON IMPLIED CONTRACT.—Under a city charter, which forbids a member of the city council from being directly or indirectly interested in any contract made by them, and statutes which forbid city officers from being interested in such contracts, and which impose a penalty for such an act, a member of a city council who has expressly contracted with it for the sale of lumber and materials to the city, cannot recover their value upon an implied contract. (*Berka v. Woodward*, 31.)

NEGLIGENCE.

1. NEGLIGENCE—DANGEROUS PREMISES—LIABILITY TO TRESPASSERS—CHILDREN.—Liability of the owner of dangerous premises to trespassers does not exist, even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed upon it by the owner, or with his knowledge permitted to remain there. (*Cooper v. Overton*, 864.)

2. NEGLIGENCE—DANGEROUS PREMISES—LIABILITY OF OWNER TO TRESPASSERS.—The owner of an unfenced, vacant city lot, upon which is situated a pond of surface water caused by the obstruction of a natural drain by city authorities, unknown to such owner, is not required to fence it or otherwise insure the safety of trespassers, old or young, who may go upon the premises, not by his invitation express or implied, but for purposes of amusement or from motives of curiosity. In such case, the owner is not liable for the death of a child ten years old who is drowned while playing on the pond. (*Cooper v. Overton*, 864.)

3. NEGLIGENCE—ORDINARY CARE.—Any failure by one engaged in the pursuit of his own occupation or business to observe precautionary rules or regulations established by competent authority to guard against accidents and prevent injury to others, is, in legal contemplation, a want of ordinary care. (*Schmidt v. St. Louis R. R. Co.*, 380.)

4. NEGLIGENCE—ORDINARY CARE.—Under some circumstances, a very high degree of vigilance is demanded by the requirement of ordinary care. Thus, if the consequences of negligence may probably be serious injury to others, and where the means of avoiding the infliction of such injury are completely within the party's power, ordinary care requires the utmost degree of human vigilance and foresight. (*Schmidt v. St. Louis R. R. Co.*, 380.)

5. NEGLIGENCE—ORDINARY CARE.—The term "ordinary care," when used to define the duty of a gripman on a street-car toward a young child just dismissed from school and about to cross in front of his car, means that degree of care which, in the ordinary experience of mankind, must be expected to be exercised toward such child. (*Schmidt v. St. Louis R. R. Co.*, 380.)

6. NEGLIGENCE—CITY RAILWAY'S RATE OF SPEED.—An ordinance authorizing a city railway company to run its cars at a rate of speed not exceeding twelve miles per hour is not a license to run at that rate under any and all surroundings, and does not relieve the company and its servants in charge of its trains of the duty of holding them in such control that they can stop them in the shortest time and space possible on the first appearance of danger observable by the vigilant watch imposed by such ordinance. If there is a crowd of school children on the street, the gripman in charge of a street-car must so regulate the speed of his car and

handle the appliances for its control as one capable of handling with skill such a machine and mindful of his responsibility would do. (Schmidt v. St. Louis R. R. Co., 380.)

7. NEGLIGENCE—BURDEN OF PROOF.—If plaintiff declares that defendant was guilty of negligence causing the injury in question, and defendant pleads that plaintiff was guilty of contributory negligence, the burden of proving the defendant's negligence and its consequences is upon the plaintiff, and the burden of proving the plaintiff's contributory negligence is upon the defendant. If such plaintiff's own evidence shows that he was guilty of contributory negligence, the court should take the case from the jury and direct a nonsuit. (Schmidt v. St. Louis R. R. Co., 380.)

8. NEGLIGENCE—BARBED WIRE FENCE—LIABILITY FOR INJURIES CAUSED BY.—The erecting of a barbed wire fence wholly on one's own land and not along the line of the sidewalk, for the sole purpose of keeping off trespassers, is not the doing of an act in expectation of trespassers and with intent to do them harm, which will render such person liable within the meaning of the spring gun cases. (Quigley v. Clough, 303.)

9. NEGLIGENCE—INJURY TO TRESPASSER.—A property owner, who does an act with reference to a trespasser's presence and directed against him, and that sufficiently clearly threatens the danger which it brings to pass, is liable to such trespasser for the injury caused, although he did not contemplate or intend actual damage. (Palmer v. Gordon, 302.)

10. NEGLIGENCE—FIRES—RULE OF LIABILITY—WOODLANDS.—The rule of liability for fires negligently set, in woodlands as well as in cities, villages, and other localities, is that the damage must be the proximate result, or natural and direct effect, of the negligent act. (Hoffman v. King, 715.)

11. NEGLIGENCE—LOSS FROM FIRES WHICH HAVE SPREAD OVER INTERVENING LANDS—LIMIT OF LIABILITY.—If a person lights a fire upon his own premises, on which he has maintained inflammable material extending to his neighbor's lands, and the fire, fed by this material, spreads upon abutting lands, the damage is the proximate result of the act and a liability exists; but this is the limit, and, if the fire once set runs across the lines of an abutting owner, and upon the lands of other proprietors, the damage caused to the latter is the remote result of starting the fire, and the one who started it is not answerable for such damage. (Hoffman v. King, 715.)

12. NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.—Proximate cause is that which immediately precedes and produces the effect, and, where the evidence is undisputed, the question as to what is proximate cause is always for the court, and not for the jury. (Hoffman v. King, 715.)

13. NEGLIGENCE—PRESUMPTION FROM RUNAWAY.—No presumption of defendant's negligence can be legitimately drawn from the mere fact that horses driven by him ran away and caused an injury. (Creamer v. McIlvain, 186.)

14. NEGLIGENCE—DRIVING HORSES — PRESUMPTION.—Negligence cannot be inferred from the fact that a driver does not discontinue a drive when his horses, which had previously been gentle and easily managed, showed signs of being unruly. (Creamer v. McIlvain, 186.)

See Damages, 6, 7; Estoppel, 1; Insurance, 21, 22; Railroad Companies, 1, 2.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—CONSIDERATION — ESTOPPEL.—If a note is given to the payee merely to enable him to quit work, and he has abandoned a lucrative occupation in anticipation of the note being paid, in accordance with the intentions of the maker, neither he nor his legal representatives can resist payment of such note on the ground that it is without consideration. The facts in such case create an equitable estoppel. (*Ricketts v. Scothorn*, 491.)

2. NEGOTIABLE INSTRUMENTS—CONSIDERATION — ESTOPPEL.—A note given to the payee to enable him to quit work, without conditions imposed or promises exacted, is without consideration, and nonenforceable, in the absence of facts creating an equitable estoppel. (*Ricketts v. Scothorn*, 491.)

3. NEGOTIABLE INSTRUMENTS—GRATUITY—CONSIDERATION.—A note given to the payee as a mere gratuity is nothing more than a promise to make a gift in the future, and, in the absence of special circumstances, cannot be enforced. (*Ricketts v. Scothorn*, 491.)

4. NEGOTIABLE INSTRUMENTS — INDORSEMENT IN BLANK—PAYMENT TO AGENT.—If a note indorsed in blank by the payee is delivered to an agent for collection, payment thereof by the maker to such agent while the note is in his possession, after the death of the payee and without notice thereof, discharges the debt. (*Deweese v. Muff*, 488.)

5. NEGOTIABLE INSTRUMENTS—TRANSFER WITHOUT INDORSEMENT—ASSIGNMENT.—A note payable to a person or order may be transferred by the payee, without a commercial indorsement, by either an oral or a separate, distinct, written assignment thereof, followed by delivery. The transferee is, in such case, liable to any defenses against the original payee. (*Sackett v. Montgomery*, 522.)

6. PROMISSORY NOTES—AGREEMENT TO RENEW.—An oral agreement that the payee of notes would renew them until such time as an improvement in the business situation would enable the maker to proceed in business without assistance directly contradicts the promise appearing on the face of the notes, and cannot be proved in an action of law. (*Hall v. First Nat. Bank*, 255.)

7. PROMISSORY NOTES—RELIEF AGAINST IN EQUITY ON ACCOUNT OF AN AGREEMENT TO RENEW.—An oral agreement alleged to have been made prior to the execution of promissory notes to renew them from time to time until the improvement in the business situation would enable the maker to provide for their payment cannot be enforced in equity, nor can it justify the granting of an injunction against an action at law to enforce such notes according to their tenor. (*Hall v. First Nat. Bank*, 255.)

8. ESTOPPEL BY BLANK INDORSEMENT OF NON-NEGOTIABLE INSTRUMENT.—The true owner of a non-negotiable instrument is not estopped from asserting his ownership, where the instrument has been assigned by a blank indorsement on the back, and has been intrusted to another for safekeeping only, in the absence of evidence showing a custom for such instruments to pass from hand to hand like negotiable instruments. (*Scollans v. Rollins*, 284.)

9. NEGOTIABLE INSTRUMENT—MUNICIPAL REGISTERED BOND AS.—An instrument not under seal, bearing on its face the words "Registered Bond," and which certifies that there will be due from the obligor, a municipal corporation, a stated sum to a

specified individual, the instrument being transferable only at the office of the city treasurer, is not negotiable. Such instrument is not rendered negotiable by an indorsement by the payee authorizing its transfer on the books of the city treasury. (Scollans v. Rollins, 284.)

10. **NEGOTIABLE INSTRUMENTS—FAILURE TO SELL COLLATERAL SECURITY AS A DEFENSE.**—If a defendant gives corporate stock as collateral security for his promissory note, it is no defense to an action on the note that the stock has declined in value, and that if the plaintiff had sold it in time it would have been sufficient to pay the note, where the defendant has made no request that the plaintiff sell. (Wood's Sons Co. v. Schaefer, 305.)

11. **NEGOTIABLE INSTRUMENTS—PAROL AGREEMENT NOT TO ENFORCE.**—A promise by the payee of a promissory note, made at the time of its delivery, that he will see that the note is not enforced according to its terms, cannot be proved to defeat an action on the note. Such agreement is collateral and purely personal. (Wood's Sons Co. v. Schaefer, 305.)

See Agency, 13; Husband and Wife, 14; Payment, 6; Trover, 1.

NEW TRIAL.

See Trial, 9-11.

NONSUIT.

See Appeal, 12.

NOTICE.

See Chattel Mortgage, 3; Guaranty, 2, 3; Insurance, 3, 4; Landlord and Tenant, 4.

OFFICERS.

See Attachments, 4, 5; Contracts, 13; Corporations, 8, 13; Mandamus, 1, 2; Sheriffs, 2.

OLEOMARGARINE.

See Evidence, 8; Interstate Commerce, 2, 3; Police Power, 1.

OPINIONS.

See Witnesses, 2.

ORDINANCES.

See Municipal Corporations, 1, 2.

PARDON.

1. **PARDONS—CONTEMPTS.**—The pardoning power of the governor of a state extends to cases of imprisonment for contempt of court. (Sharp v. State, 851.)

2. **CONTEMPTS—PARDONS.**—A judgment imposing fine and imprisonment for contempt of court is a "conviction" within the meaning of a constitutional provision authorizing the governor to grant pardons "after conviction." (Sharp v. State, 851.)

3. **PARDON CANNOT RELEASE CONVICT FROM PAYMENT OF COSTS—VESTED RIGHTS.**—Constitutional and statutory authority to a governor to grant pardons and to remit fines and for-

feitures does not empower him to interfere with the vested right of a private citizen. His power, in such cases, can go no further than the public may be interested. Hence, after a person has been convicted of a misdemeanor, and costs adjudged against him, a full pardon by the governor, although it mentions "fine and costs," cannot release the convicted person from the payment of the costs, because the officers or individuals to whom such costs are due have acquired individual and vested rights in them. (Ex parte Mann, 961.)

PARENT AND CHILD.

1. **PARENT AND CHILD—CUSTODY OF CHILDREN—DIVORCE.**—If, under a decree of divorce, the custody of children has been given to one of the parents, the court should not, on habeas corpus proceedings, in effect give them into the custody of the other parent by committing them to his parents, unless the present custodian is affirmatively shown to be unfit or has forfeited his or her right to their custody. (Norval v. Zinsmaster, 500.)

2. **PARENT AND CHILD—CUSTODY OF CHILDREN.**—The custody of young children belongs of right to their parents, rather than to strangers, and a court cannot deprive a parent of such custody unless it is shown affirmatively that he or she is unfit to have such custody or has in some way forfeited the right. (Norval v. Zinsmaster, 500.)

3. **PARENT AND CHILD—CUSTODY OF CHILDREN.**—The right of a parent to the custody of his or her child is not divested or forfeited beyond recall by a letter written in a moment of caprice or discouragement. (Norval v. Zinsmaster, 500.)

See Trusts, 4, 12; Wills, 2.

PARTIES.

See Contracts, 3; Corporations, 12; Executors and Administrators, 7; Fixtures, 1.

PARTNERSHIP.

1. **PARTNERSHIP—PREFERENCES BY.**—If the members of a partnership, in good faith, solely to secure its debts to one or more, but not to all of its creditors, transfer to them, by bill of sale or otherwise, the firm property, reserving to themselves the right of redemption, the conveyance is not an assignment for the benefit of creditors, but a mortgage and a valid security, except in insolvency proceedings, even though the debtors were then insolvent, to the knowledge of the mortgagees, and the transfer covers all of the partnership assets. (Dyson v. St. Paul Nat. Bank, 358.)

2. **PARTNERSHIP—FORCED SALE OF GOODWILL OF BUSINESS.**—No forced sale or transfer can be made of the goodwill of the business in a suit to wind up a partnership, when such goodwill is based upon professional reputation and standing, or upon business connections. Such goodwill can be the subject of a voluntary sale or contract alone. (Slack v. Suddoth, 881.)

See Corporations, 12; Insurance, 14.

PAYMENT.

1. **PAYMENTS—APPLICATION OF DEPOSITS BY COURT.**—If a corporation receives advances from a bank during the time that it is making deposits and drawing checks against the same, but such deposits have not been applied by the parties, within the time prescribed by statute, a court may, in a controversy over their appli-

cation, and without disregarding the plea of the statute of limitations, order that such deposits be applied, first, to the interest due at the time of making the several deposits, and next, to the payment of the checks earliest in time, and that the application be made as of the date of the several deposits, irrespective of the time that has elapsed between the earliest items and the commencement of the action. (London etc. Bank v. Parrott, 64.)

2. **PAYMENT—APPLICATION OF DEPOSITS BY AGREEMENT.**—If a bank, after having made large advances to a corporation, takes a note from its customer, for the purpose of closing an overdraft account, and before the statute of limitations has run against any item of the account, it is competent for the parties at the time the note is given to agree upon the mode and extent to which previous deposits made by the company shall be applied in extinction of its liability for the advances. Hence, the making and acceptance of the note for an amount agreed upon between them must be regarded as an agreement, or acquiescence, on the part of the company, in their application to the extinction thereby of so much of the liability theretofore incurred as was not included in the note. (London etc. Bank v. Parrott, 64.)

3. **PAYMENT—APPLICATION OF DEPOSITS—PRIOR APPROPRIATION TO PAYMENT OF INTEREST ON ADVANCES.**—If interest upon overdrafts is, according to the usual course of business, paid by a memorandum check signed by the bank itself, this is equivalent to an additional advance of an amount equal to the interest so paid, and is not an application of deposits made by the customer. Such payment does not, therefore, affect the application of deposits to the payment of unpaid interest on advances. (London etc. Bank v. Parrott, 64.)

4. **PAYMENTS—APPLICATION OF—GUARANTY.**—A BANK which holds the note of its customer is not required, at its maturity, or thereafter, to apply thereon moneys subsequently deposited by the customer. Hence, where persons guarantee the payment of all advances made by a bank to a corporation up to an amount specified, and the bank, after making advances, but before the limit has been reached, takes a note from the corporation for the purpose of closing up an overdraft account, the fact that the corporation subsequently makes deposits, and checks against them, does not impose any obligation upon the bank to apply the deposits to the payment of the guaranteed debt, where the guaranty is for an indefinite time, and the amount thereof has not been exceeded. (London etc. Bank v. Parrott, 64.)

5. **PAYMENT—APPLICATION OF DEPOSITS—IDENTITY OF DATE AND AMOUNT.**—It does not follow, from the fact that the amount of deposits and of checks drawn by the depositor on the same day are identical, that the deposits and checks are parts of the same transaction and independent of the general account between the customer and the bank. Hence, where there is nothing more than identity of date and amount to show that they were independent transactions, the court's application of deposits to earlier items of the general account between the bank and its customer will not be disturbed on appeal. (London etc. Bank v. Parrott, 64.)

6. **PAYMENT OF DEBT—TAKING OF NOTE—GUARANTY.**—The taking of a promissory note for an existing liability does not constitute a payment of the debt, in the absence of an agreement to that effect, or evidence that such was the intention of the parties. Hence, where a bank, acting under an instrument of continuing guaranty, gives "credit" to a corporation, but takes a note from it for the amount advanced, before the limit of credit is reached, the

taking of the note does not discharge the liability of the guarantors, where it was not given or accepted in payment of the sums advanced. (London etc. Bank v. Parrott, 64.)

7. **TENDER—AMOUNT—REFUSAL.**—If a tender is refused because not deemed sufficient in amount, it cannot be avoided because too large an amount is tendered and the change demanded. (People's Furniture etc. Co. v. Crosby, 504.)

See Debtor and Creditor, 1; Eminent Domain, 6; Judgment, 2; Mortgages, 3; Pardons, 3; Sales, 3.

PENALTIES.

See Contracts, 8.

PLEADING.

1. **PLEADING—AMENDMENT—FORM OF ACTION.**—When the merits of a controversy have been determined, after a full and fair trial, and the only objection is to the form of procedure, the prevailing party will be permitted to file any amendment of his pleadings which may be necessary to obviate the objection, and thereupon to take judgment. (Johnson v. White Mountain Creamery Assn., 610.)

2. **PLEADING—SETTING FORTH CONTRACT—EFFECT OF.** If an action is brought upon a contract, which is set forth, the rights of the parties must be determined by the terms of that instrument so far as they are dependent upon it. (Greeff v. Equitable Life Assurance Soc., 659.)

3. **PLEADING—ADMISSION BY DEMURRER.**—Although a demurrer to a complaint admits all the facts alleged, and such inferences as may be fairly drawn from them, it does not admit any of the conclusions averred nor any construction put by the pleader upon the instrument pleaded. Neither does it admit the correctness of any inference drawn by the pleader from the facts alleged. (Greeff v. Equitable Life Assurance Soc., 659.)

4. **PLEADING—ISSUE—WHEN OBJECTIONABLE.**—An issue which does not clearly submit some particular question of fact to the jury is objectionable. Thus, upon the question as to whether a disputed paper is, or is not, the last will of a deceased person, the whole question should not be submitted to the jury, but the issue should require the determination of some fact, the existence or non-existence of which is material upon the legal question involved. (Lane v. Hill, 591.)

See Burglary, 6; Corporations, 20; Criminal Law, 1, 12; Damages, 4; Deeds, 1; Executors and Administrators, 7; Evidence, 6; Fraud; Insurance, 17; Judgments, 4; Larceny, 4.

POLICE POWER.

1. **POLICE POWER—REGULATION OF PROPERTY.**—Every owner of property holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. (State v. Broadbelt, 201.)

2. **THE POLICE POWER,** legitimately exercised, can neither be limited by contract nor bartered away by legislation. (State v. Broadbelt, 201.)

3. **POLICE POWER—REGULATION OF DAIRYMEN.**—An act prescribing certain sanitary regulations to be observed by dairy-

men and other individuals who supply milk to cities, towns, and villages, makes a reasonable classification of persons by whom the sale of impure milk would be especially injurious to the public, and the act, being applicable to all persons of that class, is valid, although other persons selling milk to individuals in the country are not included within its regulations. Such regulations are a valid exercise of the police power of the state, designed to protect the public health. (*State v. Broadbelt*, 201.)

4. **THE POLICE POWER CAN BE RESORTED TO FOR THE PURPOSE** of preserving the public health, safety, or morals, but it cannot be put forward as an excuse for oppressive and unjust legislation. (*State v. Broadbelt*, 201.)

5. **POLICE POWER—OLEOMARGARINE.**—A state may prohibit the manufacture of oleomargarine within its borders, and the sale of oleomargarine manufactured therein. (*Fox v. State*, 193.)

See Interstate Commerce, 2.

POLITICAL CONVENTIONS.

See Elections.

PRINCIPALS IN CRIME.

See Criminal Law, 1-3; Homicide, 1, 2.

PRIVILEGED COMMUNICATIONS.

See Libel, 8, 9.

PROCESS.

1. **ABUSE OF PROCESS—FOREIGN ATTACHMENT—MALICE.**—A writ of foreign attachment is not illegal simply because it was prematurely issued; hence, where such an attachment is issued on the day a note matures and is dishonored, and it is an open judicial question whether such issuance is strictly legal, the weight of authority being in favor of its legality, and all other facts sufficient to authorize its issue were present, and there is no evidence of actual malice, an action for abuse of civil process in issuing the attachment cannot be sustained. (*Humphreys v. Sutcliffe*, 819.)

2. **ABUSE OF PROCESS—ATTACHMENT FOR DEBT NOT DUE.**—Although a debt is not yet due, a writ of attachment may issue if other circumstances are such as to justify it; such issuance is not illegal, and there can be no recovery without express proof of malice. (*Humphreys v. Sutcliffe*, 819.)

3. **ABUSE OF PROCESS—DEFENSE—DOMESTIC ATTACHMENT.**—In an action for maliciously suing out a writ of domestic attachment, it is a sufficient defense to show that the suspiciousness of the plaintiff's conduct had made recourse to an attachment a measure of reasonable precaution. (*Humphreys v. Sutcliffe*, 819.)

4. **ABUSE OF PROCESS—MALICE.—WHEN PROCESS ISSUED IS LEGAL,** the plaintiff is answerable only for a malicious abuse of it; and where the circumstances afford no inference of malice, actual malice must be proved. (*Humphreys v. Sutcliffe*, 819.)

PUBLIC POLICY.

See Corporations, 7; Trusts, 7.

QUANTUM MERUIT AND VALEBAT.

See Contracts, 13.

RAILROAD COMPANIES.

1. **RAILROADS—NEGLIGENCE IN ALIGHTING FROM CAR—INSTRUCTIONS.**—Where there is no evidence to show that a car was going so slowly as to be substantially stopped when an accident occurred, it is reversible error to introduce such an element into an instruction to the jury. (*Neff v. Harrisburg Traction Co.*, 825.)

2. **RAILROADS—NEGLIGENCE IN ALIGHTING FROM CAR—INSTRUCTIONS.**—In an action for personal injuries, where the evidence is absolutely contradictory as to whether the plaintiff alighted from a street-car while it was in motion, it is reversible error for the court to instruct the jury that, if they took the version given by the defendants, they might find the plaintiff guilty of contributory negligence and deny a recovery; the instruction should have been absolute and peremptory instead of qualified and conditional. (*Neff v. Harrisburg Traction Co.*, 825.)

3. **RAILROADS.—IT IS CONTRIBUTORY NEGLIGENCE FOR A PASSENGER** to leave a car while it is in motion. (*Neff v. Harrisburg Traction Co.*, 825.)

4. **RAILROADS—LOSS FROM FIRES WHICH HAVE SPREAD OVER INTERVENING LANDS—LIMIT OF LIABILITY.**—Although a railroad company negligently sets a fire in inflammable material on its right of way, it is not answerable for damages caused by the spread of the fire upon the plaintiff's land, where other lands, such as woodlands covered with inflammable material, and over which the company has no control, intervene between the right of way and the plaintiff's land, and without which the fire could not have extended upon the plaintiff's premises. (*Hoffman v. King*, 715.)

5. **RAILROADS—SPARKS—DUTY TO PREVENT FIRE FROM.**—Properly constructed locomotives, with the most approved spark-arresters, will, of necessity, emit some sparks. Hence, in periods of drought, it is the duty of a railroad company to keep its right of way free from combustible material which is liable to be ignited from sparks so emitted, and a failure to do so is negligence. (*Hoffman v. King*, 715.)

6. **RAILROAD COMPANIES—DUTY IN EJECTING INTOXICATED PERSON.**—If a railroad company discovers that a person, helpless from intoxication, is upon its train without right it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. It must not expose him to great danger in thus ejecting him, and must take into consideration the climatic conditions and the propinquity of shelter. (*Haug v. Great Northern Ry. Co.*, 727.)

See Damages, 4; Eminent Domain, 1; Negligence, 6.

RAPE.

1. **RAPE—UNCHASTITY—CONSTRUCTION OF STATUTE—INTERCOURSE IN ANOTHER STATE.**—Under a statute providing that "if any male person of the age of eighteen years or upward shall carnally know or abuse any female child under the age of eighteen years with her consent, unless such female child is over fifteen years of age, and previously unchaste, he shall be deemed guilty of rape," an accused person cannot be convicted under evidence showing that the female, after she was fifteen years of age, and, previously to the act charged, had had illicit sexual intercourse for the first time with the accused in another state. (*Bailey v. State*, 540.)

2. RAPE—UNCHASTITY—CONSTRUCTION OF STATUTE.—

Under a statute providing that "if any male person of the age of eighteen years or upward shall carnally know or abuse any female child under the age of eighteen years with her consent, unless such female child is over fifteen years of age, and previously unchaste, he shall be deemed guilty of rape," a woman not "previously unchaste" is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the accused stands charged, and a woman who is over fifteen years of age and has had previous unlawful sexual intercourse with the same man is not within the meaning of the statute. (*Bailey v. State*, 540.)

3. RAPE—INDICTMENT—STATUTE OF LIMITATIONS.—In

a prosecution for rape against a person for having had sexual intercourse with a female over fifteen and under eighteen years of age not previously unchaste, and with her consent, as provided by statute, the indictment may include all acts of unlawful sexual intercourse occurring between the accused and the prosecutrix in the state after she became fifteen years of age, and which are not barred by the statute of limitations. (*Bailey v. State*, 540.)

REAL PROPERTY.

REAL PROPERTY—RECOVERY IN EJECTMENT—SET-OFF FOR IMPROVEMENTS MADE PENDING APPEAL.—One who makes improvements on land after an action has been brought to try title thereto cannot claim compensation for their value, whether such improvements are new and capable of being removed or consist merely of repairs. (*Estate of Gleeson*, 508.)

See Appeal, 15; Executors and Administrators, 5; Taxes.

RECEIVERS.

1. RECEIVERS—JURISDICTION.—If a court has no jurisdiction over the subject matter of a proceeding, it has no authority to appoint a receiver. (*Condon v. Mutual Reserve Assn.*, 169.)

2. RECEIVERS IN SUPPLEMENTAL PROCEEDINGS—REPRESENTING GENERAL CREDITORS—ACTION FOR CONVERSION.—Though a chattel mortgage, made by a debtor, is not filed as required by law, nor accompanied by an immediate delivery, nor followed by an actual and continued change of possession, of the property mortgaged, if such property is taken and sold by the mortgagee before the recovery of a judgment against the debtor, a receiver, subsequently appointed upon the basis of a judgment so recovered, cannot maintain an action against the mortgagee and the purchaser to recover damages for the conversion of the property, where the creditor represented by him was, at the time of the execution of the mortgage, and of the sale, a general creditor of the mortgagor, having no attachment or judgment. (*Stephens v. Meriden Britannia Co.*, 678.)

3. RECEIVERS IN SUPPLEMENTAL PROCEEDINGS—ACTION FOR CONVERSION—TRANSFER IN FRAUD OF CREDITORS.—A receiver, in proceedings supplementary to execution, may file a bill in equity to set aside a transfer of the debtor's property, made before his appointment, if the transfer was in fraud of creditors, but he cannot maintain an action at law for the conversion of property so transferred, because it is not "the property of the judgment debtor." (*Stephens v. Meriden Britannia Co.*, 678.)

4. STATUTES—CONSTRUCTION—RECEIVERS AND OTHER TRUSTEES.—The statute of New York declaring and extending the powers of executors, assignees, receivers, and other trustees, does

not apply to receivers appointed in proceedings supplementary to execution. (*Stephens v. Meriden Britannia Co.*, 678.)

RECEIVING STOLEN GOODS.

1. **RECEIVING STOLEN GOODS—POSSESSION AS EVIDENCE.**—Recent possession of stolen property is evidence either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the circumstances, and, unexplained, is sufficient to warrant a conviction. (*State v. Guild*, 395.)

2. **RECEIVING STOLEN PROPERTY—POSSESSION—IDENTIFICATION.**—If, in a prosecution for receiving stolen goods, it is shown that a quantity of flour, some dry goods, and a bag containing seventy pounds of coffee were stolen, and that an empty coffee bag, some flour, and the dry goods were found in defendant's possession, the jury have the right to conclude that the flour was the stolen property and that the bag contained coffee when it was received by the defendant. (*State v. Guild*, 395.)

3. **RECEIVING STOLEN GOODS.—INDICTMENTS** for receiving stolen goods need not allege the thief's name nor who stole the goods. (*State v. Guild*, 395.)

4. **RECEIVING STOLEN GOODS—GUILTY KNOWLEDGE.** Being present where stolen property is concealed, knowing it to be stolen and keeping silent and refusing to give information to officers searching therefor, or attempting to escape, is, when unexplained, conduct sufficient to warrant a conviction of receiving stolen goods knowing them to have been stolen. (*State v. Guild*, 395.)

RECOUPMENT.

See Setoff, 1-3.

REDEMPTION.

See Insurance, 9; Mortgages, 8.

REFORMATION OF DEEDS.

See Husband and Wife, 4, 5.

RENTS.

See Fraudulent Conveyances, 4.

REPLEVIN.

1. **REPLEVIN—WAREHOUSE RECEIPTS.**—If a mortgagor of wheat delivers it to an elevator, and turns over to a third person, in payment of a claim, general storage tickets for such wheat issued by the elevator company, the mortgagee cannot maintain an action of replevin against such third person for the mortgaged wheat, as he has neither actual nor constructive possession thereof. In such case, the holder of the storage tickets has no control over the identical wheat covered by the mortgage, nor over the mass with which it is mingled, and can only claim from the elevator company the delivery to him of the number of bushels of wheat named in such tickets, of the grade therein specified, without reference to the source from which the elevator company may obtain the grain for delivery. (*Best v. Muir*, 742.)

2. **REPLEVIN—DEMAND—WAIVER.**—If a demand is necessary, not only to lay the foundation for the remedy of replevin, but

also to complete a right of possession in the plaintiff, the defendant, by denying the right of possession, does not waive the demand. (*People's Furniture etc. Co. v. Crosby*, 504.)

3. **REPLEVIN BOND—ACTION UPON—TITLE TO PROPERTY.**—If the plaintiff in an action of replevin, after giving bond and obtaining possession of the property, fails to enter his writ, he is not estopped in an action upon such bond from proving that he was the owner of the property and that the defendant in the replevin suit never had any interest therein. (*Easter v. Foster*, 257.)

RESCISSION.

See *Infants*, 7; *Insurance*, 4; *Sales*, 4-7; *Vendor and Purchaser*, 7.

RES GESTÆ.

See *Homicide*, 3.

RESTRAINT OF TRADE.

See *Contracts*, 9, 10; *Damages*, 2.

ROBBERY.

ROBBERY—INSTRUCTIONS.—Under a statute providing that robbery may be committed against a person "by violence to his person, or by putting him in fear of some immediate injury to his person," where the indictment alleges a robbery from a person by putting him in fear, it is error to instruct the jury to find the accused guilty if he committed robbery by force and violence to the person. (*State v. Crowell*, 402.)

See *Homicide*, 7.

RULE IN SHELLEY'S CASE.

See *Wills*, 17.

SALES.

1. **SALES—WHAT CONSTITUTES.**—A contract providing that a person shall sell goods manufactured for him, on commission for the manufacturer's account, is an absolute sale when the price of the goods is fixed by the contract with terms of discount, and it also provides that cash received on sales shall be remitted to the manufacturer and credited on the indebtedness, and that notes taken shall be held as collateral security therefor, and that goods remaining unsold on a certain date are to be held subject to the manufacturer's order. (*Yoder v. Haworth*, 496.)

2. **SALE OR AGENCY.**—Delivery of goods by a principal to his agent to be sold by the latter on commission is not a sale of the goods to the agent. (*Gilman v. Gilby*, 791.)

3. **CONDITIONAL SALES—PART PAYMENT—DEMAND.**—If goods have been sold, reserving title as security for the purchase money payable in installments, a large portion of which has been paid, and the vendor has accepted payments, after the day when payment should have been completed, he cannot retake the goods without notice and without demand. In such case, a tender on demand of the amount remaining due is sufficient to retain in the vendee the right of possession. (*People's Furniture etc. Co. v. Crosby*, 504.)

4. **RESCISSION—LACHES.**—A purchaser of a business who, within a week, discovers that the sale was fraudulent and offers

to rescind, and, upon refusal, tests the matter further for two months, and then makes an absolute rescission, is not guilty of unwarrantable delay in rescinding the sale. (*Boles v. Merrill*, 308.)

5. RESCISSION—FRAUDULENT REPRESENTATIONS IN A SALE.—Statements made during the negotiations for a sale of personal property and of the business in which it is used, by an agent who assumes to be the owner, that the business has certain regular customers who pay stated sums monthly, and that the business was earning a net sum yearly, are material representations, which, if made falsely and fraudulently, justify a rescission of the contract; but a mere statement that a third party had offered a certain sum for the property and business is mere dealers' talk. (*Boles v. Merrill*, 308.)

6. SALES—FRAUD OF BUYER—RESCISSION.—Although, as between the original parties, a sale and delivery of goods obtained by fraud is voidable and may be rescinded at the option of the seller and the goods reclaimed from the fraudulent purchaser, yet, if the goods have passed into the hands of a bona fide purchaser, for value, without knowledge or notice of the fraud, such purchaser will take a title which cannot be defeated by the defrauded seller. (*Truxton v. Falt & Slagle Co.*, 81.)

7. SALES—FRAUD—RESCISSION AS AGAINST EXECUTION CREDITORS.—The right of a defrauded vendor to avoid a sale of goods obtained from him by the vendee's fraudulent and false representations as to his solvency may be exercised and the sale rescinded after the goods have been levied upon in the possession of the vendee, under an execution sued out by a creditor of the vendee whose debt was antecedent to the fraudulent sale, although he may be a bona fide creditor without notice or knowledge of the fraud. (*Truxton v. Falt & Slagle Co.*, 81.)

See *Fraudulent Conveyances*, 1; *Insurance*, 14; *Partnership*, 2; *Vendor and Purchaser*, 1, 2.

SELF-DEFENSE.

See *Homicide*, 8, 9.

SETOFF.

1. SETOFF—RECOUPMENT.—DAMAGES that accrue to a defendant from the transaction out of which the plaintiff's cause of action arises may be recouped. (*Johnson v. White Mountain Creamery Assn.*, 610.)

2. SETOFF—RECOUPMENT—SERVICES — DAMAGES.—If a plaintiff brings an action to recover for services rendered during a certain time, damages which were the direct result of his negligence and disobedience of orders in performing such services may be recouped. (*Johnson v. White Mountain Creamery Assn.*, 610.)

3. SETOFF—RECOUPMENT—DAMAGES — JUDGMENT FOR EXCESS.—If a defendant pleads his demand in recoupment, and his damages are greater than the amount due to the plaintiff, he is entitled to judgment for the excess. (*Johnson v. White Mountain Creamery Assn.*, 610.)

SHERIFFS.

1. SHERIFFS—ACTION AGAINST—STATUTE DIRECTING SUBSTITUTION OF INDEMNITOR—CONSTITUTIONALITY OF. A statute which requires the court, upon the application of the sheriff, to substitute the applicant's indemnitor as defendant in the action, when the sheriff is sued for the recovery of chattels levied upon,

or for damages by reason of a levy upon personal property, is mandatory, and violative of the constitutional prohibition against the taking of private property without due process, to the extent that it requires such substitution in opposition to the plaintiff's wishes. (*Levy v. Dunn*, 699.)

2. EXEMPTIONS—RIGHTS AND DUTIES OF OFFICERS IN RESPECT TO.—If the defendant makes a formal demand for his exemptions upon the officer who has seized his property under a writ of attachment, the officer must exercise discretion as to turning over the property claimed; and, if such officer is convinced that the exemption claim is without foundation, he must refuse to comply with such demand. (*Oliver v. Wilson*, 784.)

See Evidence, 5; Executions, 1, 6.

SHERIFF'S DEED.

See Executions, 6.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—DISCRETION OF COURT.—Although a court may, in the exercise of a sound discretion, grant or withhold a decree for the specific performance of an executory contract for the sale and conveyance of land, this discretion is not arbitrary or capricious, but judicial, and if the contract has been entered into by competent parties, and is equitable and not objectionable in its nature and the circumstances surrounding it, specific performance is a matter of right. (*Abbott v. Moldestad*, 348.)

2. SPECIFIC PERFORMANCE OF CONTRACT TO PAY THE PURCHASE MONEY.—If parties make a mutual executory contract for the sale of land, the vendor agreeing to convey and the vendee to pay the purchase price, equity regards the vendee as the beneficial owner of the land, though he has not paid the purchase price. Hence, in such case, the vendor may proceed to enforce specific performance by a suit wherein the vendee's equitable estate under the contract may be sold in pursuance of the decree. (*Abbott v. Moldestad*, 348.)

STARE DECISIS.

See Courts, 4.

STATE'S EVIDENCE.

See Criminal Law, 10, 11.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. CONSTITUTIONAL LAW—TITLE OF ACT.—Entitling an act a supplement to a former act complies with the constitution only when so much of the original title is recited as expresses the object of the proposed law, and, if that object be expressed, the constitution does not defeat the statute merely because it is erroneously styled a supplement. (*Schmalz v. Wooley*, 637.)

2. CONSTITUTIONAL LAW—TITLE OF ACT.—A statute entitled "A further supplement to an act entitled 'An act to protect trademarks and labels,'" constitutionally expresses the object of such statute in its title as the protection of trademarks and labels, although there is, in fact, no prior act entitled, "An act to protect trademarks and labels." (*Schmalz v. Wooley*, 637.)

3. CONSTITUTIONAL LAW—UNUSUAL PUNISHMENT.—A STATUTE providing for the punishment of habitual criminals does not impose a cruel and unusual punishment, within the meaning of article 26 of the declaration of rights, since this declaration is directed to courts and not to the legislature. (*McDonald v. Commonwealth*, 293.)

4. CONSTITUTIONAL LAW—EX POST FACTO.—A statute imposing a heavier penalty in the case of a previous offender is not an *ex post facto* law. (*McDonald v. Commonwealth*, 293.)

5. CONSTITUTIONAL LAW—PUNISHMENT OF HABITUAL CRIMINALS.—A statute imposing a heavier penalty in the case of a previous offender, and providing that other offenses may be shown by convictions in this or another state or both, is not unconstitutional as denying to such offender a fair and impartial trial, nor as trying one for crimes committed in other states. In fixing a penalty, regard may be had to previous conduct without limiting it to the jurisdiction in which the last offense was committed. (*McDonald v. Commonwealth*, 293.)

6. STATUTES—GENERAL AND SPECIFIC PROVISIONS—CONSTRUCTION.—It is a cardinal rule of statutory construction that specific provisions upon a particular subject control general provisions for the class to which that subject belongs. Hence, a provision in one part of a code of laws, which refers to contracts in general, that the consent of parties to a contract shall be communicated to each other, does not apply to a contract of absolute guaranty for the debt or default of a third person, where the specific provisions as to guaranty are found in another part of the same code. (*London etc. Bank v. Parrott*, 64.)

7. CONSTITUTIONAL LAW—TRADEMARKS AND LABELS BY ASSOCIATIONS.—A statute providing "for the adoption of labels, trademarks, and forms of advertising by associations or unions of workingmen, and to regulate the same," does not violate a constitutional prohibition against the passage of special laws granting exclusive privileges. (*Schmalz v. Wooley*, 637.)

See Assault, 1; Civil Death, 1; Corporations, 5, 7, 21; Criminal Law, 8; Rape, 1, 2; Receivers, 4; Sheriffs, 1.

STOCKS.

See Contracts, 5-7.

SUBROGATION.

See Insurance, 9, 10, 12.

SUBSCRIBING WITNESSES.

See Chattel Mortgages, 2, 3.

SUPPLEMENTARY PROCEEDINGS.

See Executions, 2; Receivers, 2, 3.

TAXES.

TAXES—TOWN REALTY IN ONE TOWN OWNED IN ANOTHER—EXEMPTION—PUBLIC PURPOSE.—Under the statutes of New Hampshire, land, and appurtenances upon it, if owned by one town, and situated in another, may be taxed in the town in which the property is located. The property of a town, though

used for public purposes, if situated in another town, is not exempt from taxation. (*Newport v. Unity*, 626.)

See Interstate Commerce, 1.

TRADEMARKS.

1. TRADEMARKS BY ASSOCIATION.—A number of workmen engaged in the same branch of industry may band together for their mutual profit, in the pursuit of their common industry, and acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons, and such trademark is entitled to protection. (*Schmalz v. Wooley*, 637.)

2. TRADE NAMES—GEOGRAPHICAL NAME—INJUNCTION. While a man cannot appropriate a geographical name, yet, if such a name becomes so associated with the goods of a manufacturer that its use by another, unqualified and unexplained, would mislead the customers of the first and tend to defraud the public, the second manufacturer will not be allowed to use such name without distinguishing his wares, and an injunction restraining him from using the general geographical name will be issued. (*American etc. Co. v. United States etc. Co.*, 263.)

See Statutes, 7.

TRADE NAME.

See Trademarks, 2.

TREASURERS.

See Banks and Banking; Mandamus, 8.

TRESPASS.

1. TRESPASS—DAMAGES—PRIOR ACTION.—At common law, after a party obtains judgment in ejectment, he may maintain trespass for mesne profits and recover, as a part of the damages, the costs necessarily incurred in the action of ejectment. (*Fowler v. Owen*, 588.)

2. TRESPASS—DAMAGES—NECESSARY EXPENSES OF FORMER SUIT.—A plaintiff, in an action of trespass quare clausum, is entitled to recover costs and expenses necessarily incurred and actually paid by him in a former action to regain possession of the land, without regard to the form of the action; and it is immaterial that the plaintiff's preliminary proceedings were in equity instead of law. (*Fowler v. Owen*, 588.)

3. TRESPASS—JOINT LIABILITY.—If acts of trespass are committed by one person under the procurement or authority of another, both are jointly and severally liable. (*Fowler v. Owen*, 588.)

4. TRESPASS—BAR TO ACTION—UNSATISFIED JUDGMENT.—When two persons are jointly and severally answerable for a trespass, an unsatisfied judgment against one is no bar to the plaintiff's right to recover damages against the other in a subsequent action of trespass quare clausum. (*Fowler v. Owen*, 588.)

5. TRESPASS—COMPETENT EVIDENCE.—Evidence that a defendant, in an action of trespass quare clausum, defended a former action brought by the plaintiff against a third party to recover the premises, is competent as tending to show that the acts of trespass were committed by his procurement and under his authority. (*Fowler v. Owen*, 588.)

6. **TRESPASS—EVIDENCE PROPERLY EXCLUDED.**—An intruder upon the title of the state may maintain trespass against a stranger. Hence, where the defendant makes no claim to a right of possession under the state, evidence that the title is in the state, and not in the plaintiff, is properly excluded. (*Fowler v. Owen*, 588.)

See Negligence, 1, 2, 9.

TRIAL.

1. **TRIAL BY JURY—WAIVER OF BY CONDUCT.**—A defendant waives his right to a trial by jury where, after the withdrawal of the plaintiff's request for a jury, and after the clerk has taken the case from the list of cases for trial by jury and has placed it on the jury waived list, though without any special order of court, he makes no complaint and no effort to have the case retransferred to the list of cases for trial by jury until the case is actually reached for trial. (*Stevens v. McDonald*, 300.)

2. **TRIAL—WAIVER OF JURY.**—An express declaration of a party is not necessary in order to constitute a waiver of his right to a jury trial. A waiver may be found from conduct. (*Stevens v. McDonald*, 300.)

3. **FORMER JEOPARDY—PLEA OF, WHEN NOT MAINTAINABLE. WHERE VERDICT FOR MURDER FAILS TO STATE DEGREE.**—If the jury, in a murder case, where the indictment charges murder in the first degree, find the defendant guilty as charged, but fail to state the degree of murder, as required by the statute, and a new trial is granted, presumably because of such defect in the verdict, the defendant cannot maintain a plea of former jeopardy, on the ground that such verdict operated as an acquittal. (*Garza v. State*, 927.)

4. **TRIAL—ERROR IN ADMITTING TESTIMONY—WITHDRAWAL—RULE AS TO CURING ERROR.**—To determine whether an error of the court in admitting testimony is cured by the subsequent exclusion thereof, and its withdrawal, by the court, from the consideration of the jury, the rule is that, if the testimony is not of a very material character, it may be withdrawn by the court, and the error be thus cured, but if, on the contrary, the evidence is of a material character, and is calculated to influence or affect the jury, its withdrawal from their consideration does not heal the vice of its admission. (*Barth v. State*, 935.)

5. **TRIAL—CONTINUANCE, WHEN PROPER—ABSENT WITNESSES.**—It is error to overrule an application for a continuance on the ground that a witness is absent, where it appears that the testimony of the absent witness is material, and that due diligence has been used to secure his attendance. (*Clark v. State*, 918.)

6. **TRIAL—EVIDENCE.**—The decision of preliminary issues touching the competency of witnesses or admissibility of evidence is for the trial judge, and not for the jury, and, if proffered evidence is prima facie admissible, it is the duty of the court to receive it, otherwise to reject it. (*Phenix Ins. Co. v. Holcombe*, 532.)

7. **TRIAL—RIGHT OF PRISONER TO COUNSEL.**—In Massachusetts, there is no constitutional provision guaranteeing counsel to a prisoner, and no statutory provision except in indictments for a capital crime. (*McDonald v. Commonwealth*, 293.)

8. **TRIAL—OBJECTION TO EVIDENCE—WAIVER.**—A party waives his right to object that the evidence produced by his adversary is insufficient to justify a verdict in the latter's favor by suffering the case to go to the jury without objection. (*Lane v. Hill*, 591.)

9. NEW TRIAL—CONTINUANCE—ALIBI.—In a case of circumstantial evidence, where the defendant is charged with the theft of mules, it is error to overrule a motion for a continuance to secure the testimony of a witness, where it would probably be true and would establish an alibi; and, if the defendant is convicted, a new trial should be granted because of such error. (*Long v. State*, 954.)

10. NEW TRIAL—ABUSE OF DISCRETION IN REFUSING. Where a court instructs a jury to find for the plaintiff in a certain amount, and the jury, in disregard of such instruction, brings in a general verdict for the defendant, the plaintiff has a right to have the verdict set aside and to have a new trial granted, and it is an abuse of discretion for the court to direct the plaintiff to accept a sum less than the amount to which she is entitled in full settlement of her claims, or if she refuses to take nothing. (*Lehr v. Brodbeck*, 828.)

11. NEW TRIAL—CONTINUANCE—ABSENT WITNESSES.—A motion for a new trial upon the ground that the court erred in overruling a motion for a continuance, predicated on the absence of a material witness, should be overruled where there was a manifest want of diligence in procuring the attendance of the witness, particularly if it further appears that his testimony, if he were present, would not be true, and that it would not probably change the result upon another trial. (*Garza v. State*, 927.)

See Appeal, 10; Instructions, 3-6.

TROVER.

1. TROVER TO RECOVER NON-NEGOTIABLE INSTRUMENT FROM BONA FIDE PURCHASER.—A sale of a non-negotiable instrument to a purchaser in good faith and for value, by one who has got it feloniously from the true owner, does not divest the property of the true owner, and he may recover it in action for conversion. (*Scollans v. Rollins*, 284.)

2. JUDGMENT IN TROVER, VESTING TITLE BY.—A judgment for the conversion of property does not operate to extinguish the owner's title to the property converted and vest it in the wrongdoer, nor does it bar the owner's right to assert title to such property. Such bar arises only upon payment of the judgment. (*Gilman v. Gilby*, 791.)

TRUSTEES.

See Judgments, 11; Receivers, 4; Trusts.

TRUSTS.

1. DEEDS OF TRUST—PRESUMPTION OF ACCEPTANCE.—As between the parties to a deed of trust made for the benefit of creditors, the beneficiaries are presumed to accept it, if beneficial to them. (*Fearey v. O'Neill*, 440.)

2. DEEDS OF TRUST—VESTING OF TITLE IN TRUSTEE—ASSENT OF BENEFICIARIES.—If a conveyance is made directly to a trustee for the benefit of creditors, the legal title passes to the trustee without further evidence of assent on the part of the beneficiaries. (*Fearey v. O'Neill*, 440.)

3. DEEDS OF TRUST—VESTING OF TITLE IN TRUSTEE—DEFENSE AGAINST ATTACHMENT.—A trustee who claims possession of a stock of goods, conveyed to him as trustee for the benefit of certain creditors, establishes a complete defense against an attaching creditor by introducing in evidence such deed of trust,

proving his acceptance thereof for the benefit of such creditors, his demand for payment, a default in the payment of the debts due such creditors, and the actual delivery of possession of the goods by the grantor to him. Proof of the acceptance of him as trustee by the preferred creditors is not necessary. (Fearey v. O'Neill, 440.)

4. TRUSTS, PRECATORY—WISH AS TO CARE OF AGED FATHER.—If there is expressed a "wish and desire," in the will of a deceased wife, that her aged, infirm, and dependent father should, in case of need, be provided a home and maintenance by her husband, the intention of the testatrix to provide for the maintenance of her father is apparent, and it must be held that a devise to the husband was made on the trust that he would furnish such maintenance to the father during the latter's life, should he need or require it. (Foster v. Willson, 581.)

5. TRUSTS.—PRECATORY WORDS IN A WILL, equally with direct fiduciary expressions, constitute a trust for the person in whose favor they are used, if, from the whole transaction and the words used, such a trust may be fairly implied. (Foster v. Willson, 581.)

6. TRUSTS—JUDGMENT LIENS.—If the title to land appears of record in the name of a judgment debtor, who in fact never had any interest therein, but the whole equitable title thereto is vested, by reason of a resulting trust, in a third party, the registry law placing judgment creditors, as against unrecorded conveyances, on the same basis as bona fide purchasers, has no application, and the judgment is not a lien on the land. (School District No. 10 v. Peterson, 337.)

7. TRUSTS—INSURANCE—VALIDITY—PUBLIC POLICY.—A trust in the proceeds of an insurance policy is not rendered invalid as being against public policy by the fact that the beneficiary is the wife of a man other than the insured. (Kendrick v. Ray, 289.)

8. A TRUST IS ESTABLISHED if it appears that it was clearly and unequivocally declared and executed by the donor in favor of the claimant, and was made known by him to her, and was assented to by her. (Kendrick v. Ray, 289.)

9. TRUST—DECLARATION OF.—AN INSURANCE POLICY made payable "to and for the sole and separate use and benefit of E. A. T., trustee," indicates an intention to create a trust, and evidence of the oral and written declarations of the donor are admissible for the purpose of showing who is the beneficiary and what are the terms of the trust. (Kendrick v. Ray, 289.)

10. TRUSTS—MODIFICATION—INSURANCE POLICY.—While a voluntary trust, once clearly established, cannot be modified by subsequent declarations of the donor, yet where a trust is created by an insurance policy, the court may find that a letter written by the donor to the company before the issuance of the policy, and containing a later direction than the application as to who the beneficiary should be, should control the application and modify the policy. (Kendrick v. Ray, 289.)

11. TRUSTS.—A POWER OF REVOCATION is not inconsistent with the existence of a valid trust. (Kendrick v. Ray, 289.)

12. TRUSTS IN FAVOR OF CHILDREN—WHO INCLUDED.—A trust deed of land to one as trustee for "his wife and the children, issue of their marriage," includes as beneficiaries of the trust the wife and only such issue as are in life at the time of the execution of the trust deed, and not those born thereafter. The trust becomes executed, and the legal title to the property vests in the bene-

ficiaries, when the youngest thereof reaches the age of majority, and suit cannot be thereafter maintained by the wife and all of her children, including those born after the execution of such deed, to set aside, on the ground of fraud, a sale and conveyance of the property made by the trustee after the trust has become executed, and to re-establish the trust in favor of the wife and all of her children. (*Hollis v. Lawton*, 114.)

13. TRUSTS—JUDGMENTS AGAINST COLLATERAL ATTACK.—A judgment, fraudulent and void as to the beneficiaries of a trust, can be attacked by them as such whenever it is sought to be enforced against them. It is not incumbent upon them to move to set aside such judgment within any given time. (*Snelling v. American Freehold etc. Co.*, 160.)

UNUSUAL PUNISHMENT.

See Statutes, 3.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—TITLE BY ADVERSE POSSESSION—SALE—COMPELLING ACCEPTANCE—NEGATIVE CLAIM BY HEIRS OF FORMER OWNER.—When an executory contract for the sale of real estate provides for a deed vesting in the purchaser a title in fee simple, and the vendor's title is based entirely on adverse possession, the vendee may resist a compulsory performance of the contract on his part, unless the vendor shows that the title tendered is good, or at least marketable, as against all the world, and to do this he must not only prove that he has had possession for the statutory period, but negative the possibility of an outstanding claim to the land by the heirs of a former owner, as to whom the adverse possession has been open to the contingencies of remaindership or infancy. (*Simis v. McElroy*, 673.)

2. VENDOR AND PURCHASER—TITLE BY ADVERSE POSSESSION—SALE—COMPELLING ACCEPTANCE—HAZARD OF LITIGATION AS TO TITLE.—A vendor of land, whose title is based entirely on adverse possession, cannot require a purchaser thereof, who is entitled under his contract to a deed vesting title in fee simple, to accept such title at the peril of liability in damages for a breach of his contract, simply by showing that he has had possession for the statutory period. He must also show that the defendant cannot hereafter be called upon to litigate the question of title with strangers to the action who may claim title under some former owner. (*Simis v. McElroy*, 673.)

3. VENDOR AND PURCHASER—VENDOR'S LIEN—WAIVER OF—PRESUMPTION.—So long as the debt for the purchase price of land exists, courts will not presume that the lien has been waived, except upon clear and convincing testimony. (*Selna v. Selna*, 47.)

4. VENDOR AND PURCHASER—VENDOR'S LIEN—WAIVER OF, BY FILING CLAIM AGAINST ESTATE.—Under a statute which gives a vendor's lien to one who sells real property, independently of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, a vendor, holding a deceased purchaser's note for the balance of the purchase price of land, does not waive his lien by having his claim filed and allowed against the purchaser's estate. (*Selna v. Selna*, 47.)

5. VENDOR AND PURCHASER—VENDOR'S LIEN—WAIVER OF—BURDEN OF PROOF.—In an action to establish a vendor's

lien, the burden of proof is upon the purchaser to show that the lien has been displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches. (*Selna v. Selna*, 47.)

6. VENDOR AND VENDEE—FRAUDULENT REPRESENTATIONS AS TO QUANTITY OF LAND—DEDUCTION IN MORTGAGE.—If a conveyance tendered by a vendor indicates that the quantity of land named therein is less than that represented, and the vendee calls attention to the deficiency and is assured by the vendor that the amount represented will pass by the conveyance because of accretions along the line of a tide-water boundary of the tract, the vendee may rely upon such representations without resorting to a survey, and, if they are made, knowing them to be false, he is entitled to a reduction in the purchase money mortgage given upon the land. (*McMichael v. Webster*, 630.)

7. VENDOR AND VENDEE—FRAUDULENT REPRESENTATIONS—RESCISSION—ESTOPPEL.—A person induced to contract for the purchase of land by fraudulent representations as to its quantity, who acquires knowledge, or what is equivalent to knowledge, that the quantity of land named in the conveyance is not equal to that represented, or who is in possession of facts sufficient to put him on inquiry which would disclose the deficiency, is estopped by accepting the conveyance, to claim a rescission of the transaction. (*McMichael v. Webster*, 630.)

VERDICT.

See Homicide, 5; Trial, 3.

WAREHOUSE RECEIPTS.

See Replevin, 1.

WASTE.

See Mortgages, 5, 6.

WILLS.

1. WILLS—DEVISE TO A CLASS—TIME OF DISTRIBUTION. If a will provides that the descendants of the testator shall be paid their shares as each arrives at the age of majority, and then devises to the six children of the testator's son one undivided third of the residue of the testator's estate, and, "should any of these children die unmarried and without issue, or any other children be born to my said son, I will that all of his children divide equally, share and share alike, the said one-third of my estate," such will creates a present vested estate in such of such son's children as were living at the death of the testator subject to let in after-born children, but fixes the period of distribution at the age of majority of the oldest child. Hence, all of such son's children who came into existence before that time are entitled to share in the distribution, but any who were born after such period are excluded from such distribution. (*Thomas v. Thomas*, 405.)

2. WILLS—DEVISE TO CLASS—RIGHTS OF AFTER-BORN CHILDREN.—If, under the terms of a will, the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested interests in their shares, subject to the distribution of such shares as the members of the class are increased by future births, and, on the death of any of the children prior to the period for the distribution, their shares go to their respective representatives. (*Thomas v. Thomas*, 405.)

3. WILLS—DEVISE TO CLASS—PRESENT BEQUEST.—If a devise to a class is a present bequest, the beneficiaries who are in esse at the death of the testator take vested interests in the fund, but subject to open and let in after-born members of such class who shall come into being before the time appointed for distribution. (Thomas v. Thomas, 405.)

4. WILLS—DEVISE TO CLASS—PERIOD OF DISTRIBUTION.—If the distribution of a devise to a class is postponed by the terms of the will until the attainment of a given age by the members of such class, the legacy applies only to those who are living at the death of the testator and who shall come into existence before the first of such class attains the age named, this being the period when the fund is first distributable with respect to any member of such class. (Thomas v. Thomas, 405.)

5. WILLS—DEVISE TO CLASS—DEFERRED DISTRIBUTION.—If a legacy is given to a class of individuals, and distribution is, by the terms of the will, deferred to some time after the testator's death, the gift embraces not only all the members of the class living at the death of the testator, but also all those who shall subsequently come into existence and be living at the time designated for the distribution. (Thomas v. Thomas, 405.)

6. WILLS—DEVISE TO CLASS—TIME OF DISTRIBUTION. If a legacy is given by will to a class of individuals in general terms, and no period is fixed for the distribution, such time is the death of the testator. Under this rule, all of such class born or begotten prior to, and in esse at the time of, the death of the testator are entitled to share in the distribution, but those living at the execution of the will who die before the testator are excluded. (Thomas v. Thomas, 405.)

7. EVIDENCE—PAROL PROOF OF CONTENTS OF LOST WILL.—Upon proof that a will has been lost, its contents may be shown by parol in the same way as the contents of any other lost instrument. (Lane v. Hill, 591.)

8. EVIDENCE—PAROL PROOF TO ESTABLISH REVOCATION OF WILL.—Parol evidence of the contents of a subsequent will which has been lost, destroyed, or canceled is admissible to establish the revocation of a prior will which has continued in existence. (Lane v. Hill, 591.)

9. WILLS—REVOCATION OF, BY DESTRUCTION—PRESUMPTION.—Upon a showing that a will was, at one time, executed, that it afterward remained in the testator's possession, or was last heard of in his custody, but that at his death it could not be found, the presumption is that it was destroyed by him, *animo revocandi*; but, if the will is not shown to have been in the testator's possession, the failure to find it after his death furnishes no ground for a presumption of revocation. (Lane v. Hill, 591.)

10. WILLS—PROBATE OF—ISSUES—WHEN IMMATERIAL—PRESENTING QUESTION OF REVOCATION.—An issue that an instrument offered for probate was not the last will of the testator is immaterial, where it merely submits the question whether, after the execution of the will propounded, the testator had executed another will; and, for the purpose of submitting the question of revocation, such an issue is not properly framed. (Lane v. Hill, 591.)

11. A WILL IS NOT REVOKED BY A SUBSEQUENT ONE, which is not produced when the first will is offered for probate, unless the contents of the subsequent will can be ascertained, and are inconsistent with the former will, or expressly revoke its provisions. (Lane v. Hill, 591.)

12. WILLS—REVOCATION—PROOF OF, BY CONTENTS OF LOST WILL.—The revocation of a prior will may be shown by com-

petent evidence of the contents of a subsequent will which, though lost, is found to be inconsistent with the earlier will. (Lane v. Hill, 591.)

13. **WILLS—EXECUTION OF.—THE DECLARATIONS** of a testator are not, of themselves, sufficient to prove the due execution of his will. (Lane v. Hill, 591.)

14. **WILLS—TESTATOR'S DECLARATIONS AS TO CONTENTS OF LOST WILL—REVOCATION.**—When a will is offered for probate, and there is evidence of the due execution of a later will, and its loss, the testator's declarations as to the contents of the last will are admissible, in connection with, and in corroboration of, such evidence, to prove its contents, and establish the revocation of the will offered for probate, but the express revocation of a will, or the execution of another will revoking the former, cannot be shown by declarations of the testator alone. (Lane v. Hill, 591.)

15. **WILLS—QUESTION OF FACT.**—Whether a will was in existence at the date of the testator's death, or not, is a question of fact. (Lane v. Hill, 591.)

16. **WILLS.—THE DESTRUCTION OF A SECOND WILL DOES NOT REVIVE THE FIRST** without evidence that such was the intention of the testator, especially if the later will contained a clause of revocation. (Lane v. Hill, 591.)

17. **WILLS—DEVISE—RULE IN SHELLEY'S CASE.**—In a devise of land to a daughter "for her sole use and benefit during her natural life and for her heirs, if dying she leaves no heirs, then the said property to be sold and divided amongst her brothers and sisters and their heirs," the word "heirs" is a word of limitation, and the devise creates a fee simple in the daughter. The same is true of a devise to a daughter for her use and benefit during her life, and provided she leaves no heirs, the property to be divided amongst her brothers and sisters and their heirs. (Reimer v. Reimer, 833.)

See Trusts, 5.

WITNESSES.

1. **WITNESSES—PLACING UNDER THE RULE.**—The matter of placing witnesses under the rule is much in the discretion of the court, but, when the rule is invoked, the order of exclusion should apply to all of the witnesses, unless some good reason is shown for making an exception. (Squires v. State, 904.)

2. **EVIDENCE.—OPINIONS OF WITNESSES** as to what will attract children to a pond of water, or as to whether children like to ride on a plank in the water, are incompetent and inadmissible as evidence. (Cooper v. Overton, 864.)

3. **TRIAL — EXAMINATION OF WITNESS — REVERSIBLE ERROR.**—The cross-examination of a girl fourteen years old, by asking her confusing questions as to what her testimony has been on former examinations, and the remarks of the court thereon, may be, and in this case were, so unfair as to require a reversal of the judgment on that ground alone. (Schmidt v. St. Louis R. R. Co., 380.)

4. **WITNESSES—IMPEACHMENT.—THE CREDIBILITY** of a defendant witness may be attacked, on cross-examination, by eliciting from him the fact that he has been convicted of a felony, whether he has been pardoned or not. (Clemmons v. State, 923.)

See Subscribing Witnesses; Trial, 5, 11.

WRIT OF ERROR.

See Appeal, 12.



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